

No. 05-477 OCT 11 2005

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In The
Supreme Court of the United States

DOUBLE EAGLE HOTEL & CASINO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. WHETHER THE COURT OF APPEALS ERRED IN IMPORTING A CONSTITUTIONAL OVERBREADTH STANDARD INTO THE ARENA OF NATIONAL LABOR RELATIONS ACT JURISPRUDENCE, IN DIRECTING AN EMPLOYER TO OFFER REINSTATEMENT TO AN EMPLOYEE WHO WAS TERMINATED FOR CONDUCT THAT THE EMPLOYER COULD LAWFULLY PROSCRIBE.
- II. WHETHER THE COURT OF APPEALS' NEWLY CRAFTED OVERBREADTH RULE AND REMEDY CONFLICTS WITH SECTION 10(c) OF THE NATIONAL LABOR RELATIONS ACT AND CONFLICTS WITH THIS COURT'S DECISION IN *N.L.R.B. v. TRANSPORTATION MANAGEMENT CORP.* AND THE DECISIONS OF ALL OF THE CIRCUIT COURTS OF APPEALS UPHOLDING AND APPLYING THE BOARD'S *WRIGHT LINE* TEST.
- III. WHETHER THE COURT OF APPEALS ERRED IN ADOPTING A RULE THAT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS, BY HOLDING THAT A WORKPLACE RULE PROHIBITING DISCLOSURE OF CONFIDENTIAL EMPLOYEE INFORMATION VIOLATED SECTION 8(a)(1) OF THE NATIONAL LABOR RELATIONS ACT, WHERE NO REASONABLE EMPLOYEE WOULD BELIEVE THE RULE RESTRICTED AN EMPLOYEE'S RIGHT TO DISCUSS HIS OR HER OWN TERMS OF EMPLOYMENT.

**RULE 29.6 CORPORATE
DISCLOSURE STATEMENT**

Petitioner Double Eagle Hotel & Casino ("Double Eagle") is owned and operated by Double Eagle Resorts, Inc., a privately held Colorado corporation. Double Eagle Resorts, Inc. is wholly owned by Colorado Casino Resorts, Inc., a privately held Texas corporation. No publicly held company owns 10% or more of the stock of Colorado Casino Resorts, Inc. or Double Eagle Resorts, Inc.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 414 F.3d 1249 (10th Cir. 2005). A copy of this opinion is attached hereto at pages 1 through 21 of the Appendix. The Decision and Order of the National Labor Relations Board, Cases 27-CA-17816-2 and 27-CA-18048-1 is attached hereto at pages 22 through 44 of the Appendix. The Decision of the Administration Law Judge in Cases 27-CA-17816-2 and 27-CA-18048-1 is attached hereto at pages 45 through 71 of the Appendix.

JURISDICTION

The Court of Appeals for the Tenth Circuit issued its opinion in this matter on July 13, 2005. No Petition for Rehearing was filed. This Court has jurisdiction to review the decision of the Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 157

(National Labor Relations Act, Section 7)

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement

requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158(a)(1)

(National Labor Relations Act, Sections 8(a)(1), 8(a)(2) and 8(a)(3))

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it:

Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after

the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

29 U.S.C. § 160(c)
(National Labor Relations Act, Section 10(c))

* * *

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

STATEMENT OF THE CASE

Double Eagle seeks review of the July 13, 2005 Order of the Tenth Circuit Court of Appeals ("the Court") affirming a decision of the National Labor Relations Board ("NLRB"), which directed Double Eagle to offer reinstatement and back pay to certain employees who were disciplined for violating a policy against discussing tips on the Double Eagle's casino gaming floor. Although the Court acknowledged that Double Eagle could lawfully proscribe the discussion of tips on the gaming floor, and specifically found that the employees were disciplined solely for engaging in conduct that could lawfully be proscribed, the Court upheld the back pay and reinstatement order because the NLRB had found that Double Eagle's policy *also* prohibited discussion of tips in areas outside the casino gaming floor. In order to uphold the NLRB's mandated remedy for employees whose conduct was legally disciplined, the Court imported a constitutional "overbreadth" doctrine into the realm of labor-management relations, which is governed by the National Labor Relations Act ("NLRA"). The Court of Appeals' decision effects an unwarranted importing of the constitutional overbreadth doctrine into a dispute under the NLRA and

presents a case of first impression. Therefore, review of this ruling is appropriate under Rule 10(a) and (c) of the Supreme Court Rules.

Furthermore, this Court should grant certiorari under Rule 10(a) and (c) of the Supreme Court Rules to review the Court's order requiring reinstatement and back pay because it violates Section 10(c) of the NLRA, 29 U.S.C. § 160(c), conflicts with this Court's decision in *Transportation Management Corp.* and conflicts with the decisions of all of the Circuit Courts of Appeals upholding and applying the Board's *Wright Line* decision.

In addition, Double Eagle seeks review of the Court's holding that it maintained an unlawful "Confidential Information" policy. The Court reached this conclusion despite the fact that Double Eagle's policy was intended to limit only discussion of confidential information about other employees (and not to prohibit employees from discussing their own terms and conditions of employment), that the rule had never been interpreted more broadly than that, and that no employee had ever been disciplined for violating the confidentiality rules. This ruling has created a significant conflict among the Circuit Courts regarding the permissible scope of an employer's confidential information policies, and places employers who conduct business in multiple jurisdictions in an untenable position. Accordingly, review of this ruling is also appropriate under Rule 10(a) of the Supreme Court Rules.

In reviewing the record, it is evident that the Court of Appeals applied the broadest possible interpretation of Double Eagle's rules, even in the absence of supporting record evidence, in its effort to uphold the NLRB's finding of violations of the NLRA. A review of the clear language of the rules reveals that the Court's broad interpretation

was unwarranted. Although Double Eagle disputed this interpretation in the proceeding below, for purposes of this Petition, however, Double Eagle accepts the Court of Appeals' interpretation of its tips discussion rule.

A. Statement of Material Facts.

1. The Relevant Employment Policies.

Petitioner Double Eagle is a hotel and casino located in the mountain community of Cripple Creek, Colorado. The Colorado casino industry is very competitive, and Double Eagle strives to distinguish itself among its competitors by providing a superior level of customer service. In order to facilitate a customer-friendly environment, Double Eagle adopted a written Customer Service Policy as part of its Employee Handbook, which provides: "Never discuss Company issues, other employees, and personal problems to or around our guests. Be aware that having a conversation in public areas with another employee will in all probability be overheard."

To augment the Customer Service Policy, Double Eagle adopted a verbal policy prohibiting employees from discussing the splitting of tips on the casino gaming floor (the "Tip Policy"). The Tip Policy was primarily directed to the Double Eagle's slot technicians and security personnel (collectively "slot employees") who assist customers in collecting jackpots from the slot machines and, in exchange for their assistance, often receive tips from customers. The Tip Policy was implemented because, over the

years, slot technicians and security personnel had openly complained on the gaming floor about how tips were divided among Double Eagle's employees, which had led to complaints from customers.¹

The Double Eagle Employee Handbook also includes policies relating to "Confidential Information." Specifically, the policy provides:

CONFIDENTIAL INFORMATION

Pursuant to Company policy . . . you may be required to deal with many types of information that are extremely confidential and with which the utmost discretion must be observed. It is essential that no information of this kind is allowed to leave the department, other than by activity/job requirement, either by documents or verbally. A list, which is not all-inclusive, of the types of information considered confidential is shown below:

- disciplinary information
- grievance/complaint information
- performance evaluations
- salary information

¹ In order to maintain a cooperative attitude among employees on the gaming floor and to avoid disruptive disputes over tips, Double Eagle developed a tip-splitting policy. Under the original policy, all tips received on a given shift are pooled and divided between the slot and security departments, and then divided again among the personnel in those departments. Exactly how the tips were to be divided was the subject of frequent disputes among employees, and Double Eagle made several changes to this policy over time at the request of its employees.

- salary grade
- types of pay increases
- termination data for employees who have left the company

Information should be provided to employees outside the department or those outside the Company only when a valid need to know can be shown to exist. Check with management if you have any doubt or questions.

Unless there is a need for it in the normal course of business, personnel information concerning individual employees should not be discussed with members of your own group.

Working with confidential information on a day-to-day basis requires continuing effort on your part to ensure that no paperwork is inadvertently left someplace where unauthorized people may gain access, and that visitors to the department are not allowed to observe or study confidential information on and/or around your desk.

Any breach or violation of this policy will lead to disciplinary action up to and including termination.

2. The Disciplinary Action At Issue.

In October of 2001, the slot employees demanded that Double Eagle's tip-splitting policy be changed. The slot technicians became openly critical of the workload carried by security employees with whom they split tips, and openly complained on the gaming floor that they were working harder than the security employees and that the security employees were receiving more tips than they

deserved. This resulted in several incidents at the hotel and casino.

For example, a swing-shift employee initiated a prank false distress alarm that would have required a security response on the gaming floor. Betty Ingerling ("Ingerling"), a slot technician, initially told management that she set off the alarm. It was ultimately discovered that another employee had been responsible for the alarm, and Ingerling admitted that she had lied to management about this incident.

Another incident occurred when Ingerling and other slot technicians appeared for work wearing the black shirts of security employees rather than the colored shirts worn by slot technicians. This was apparently done to protest the tip-splitting policy; as one of the employees stated: "[A]s long as we're going to have to split the tips with the security the way we are, we're just going to come dressed like security." The failure to appear in uniform created a concern that customers would be confused because employees were recognized by the color of their shirts, and management could not easily identify, by shirt color, the location of slot and security employees on the gaming floor with casino surveillance cameras.

Toward the end of October of 2001, a Double Eagle manager asked a security employee, Lisa Henderson ("Henderson"), to work as a cocktail waitress for approximately one hour because they were short cocktail waitresses that evening. Henderson was told to keep the tips, rather than splitting them with the other slot employees. When Ingerling and other slot employees learned of this, they became upset and discussed their feelings about the Henderson issue and tip-splitting generally on at least

three occasions on the casino floor with other Double Eagle employees. It is this last incident which led to the disciplinary action at issue.

Ingerling had been involved in several prior incidents and had been specifically counseled about discussing tips on the gaming floor. Consequently, Ingerling was terminated as a result of her conduct in complaining about the Henderson incident and the tip-splitting issue on the gaming floor. Two other employees, Carol Marthaler and Barbara McCoy, received suspensions for discussing the Henderson issue and tip-splitting issue on the gaming floor. Only employees who discussed the tip-splitting issue on the gaming floor in violation of the Tip Policy were disciplined; there was no discussion of the Confidential Information policy, nor was any discipline imposed for violation of the Confidential Information policy.

B. Proceedings Below.

1. The Administrative Law Judge Hearing.

The International Brotherhood of Electrical Workers, Local No. 113 ("Union") filed an unfair labor practice charge before the National Labor Relations Board ("NLRB") against Double Eagle in response to the discipline of Ingerling and the other employees. In addition, the Union challenged other of Double Eagle's policies, including the Confidential Information policy, although no employees had ever been disciplined for violating those policies.

At a hearing before the Administrative Law Judge ("ALJ") in November 2002, conflicting testimony was presented regarding the scope of Double Eagle's Tip Policy.

It was undisputed that Double Eagle's Tip Policy prohibited discussion of tips on the gaming floor. However, several employees, including Ingerling, testified that they believed the policy also prohibited them from discussing tips in other areas of the hotel and casino, including the break room, restrooms and other public areas of the hotel and casino. Double Eagle disputed this assertion.

On March 3, 2003, the ALJ issued a Decision finding that the Tip Policy had violated Section 8(a)(1) of the NLRA. (See Appendix, p. 49). Among other things, the ALJ accepted the testimony of the employees that the Tip Policy prohibited discussion of tips not just on the gaming floor, but "anytime, anywhere on the company property" and, therefore, violated Section 8(a)(1). (*Id.*) The ALJ further found that, "even if the rule was simply limited to the gaming floor" it was unlawful because there was no "substantial business justification for it." (*Id.*)

With respect to the discipline of Ingerling and the other employees who had violated the Tip Policy, the ALJ found that the discipline was imposed as a result of the employees' discussion of the tip-splitting issue on the gaming floor. Specifically with respect to Ingerling, the ALJ found:

There is no doubt from Respondent's [Double Eagle's] admissions that absent Ingerling discussing the tip policy on the casino floor she would not have been discharged. My conclusion that Ingerling was unlawfully discharged is based on these admissions and not on Ingerling's credibility, which I find singularly lacking.

Since I have concluded that the rule violation for which Ingerling was discharged was unlawful, it follows that her discharge was also unlawful . . .

(Appendix, p. 63). Accordingly, the ALJ directed Double Eagle to offer Ingerling reinstatement and back pay and to make the other employees who had been suspended whole for any lost wages. (Appendix, p. 65-66). With respect to the Confidential Information policy, however, the ALJ found that the Policy was valid on its face, and no evidence was presented that the Policy was enforced in a fashion more restrictive than it was written. (Appendix, p. 50).

2. Proceedings Before The NLRB.

Double Eagle and the NLRB General Counsel each filed exceptions to the Decision of the ALJ. The NLRB delegated its authority in this proceeding to a three-member panel ("Board"), which affirmed as modified the ALJ's Decision on January 30, 2004. (See Appendix, p. 22-44). With respect to the Tip Policy, the Board adopted the reasoning of the ALJ. The Board further noted that:

[A]s with a retail store's selling floor, the Respondent [Double Eagle] lawfully could prohibit employees from soliciting each other and discussing their working conditions in the casino's gambling areas, and adjacent areas and corridors frequented by customers, but it could not lawfully maintain a general ban on that activity beyond that area.

(Appendix, p. 26). Thus, the Board affirmed the ALJ's ruling that the Tip Policy violated Section 8(a)(1) of the NLRA, and ordered Double Eagle to offer reinstatement and back pay to Ingerling and back pay to the other employees who were disciplined for violating the Tip Policy. (Appendix, p. 35-36). The Board directed Double Eagle to cease and desist from, among other things,

"[m]aintaining a rule prohibiting employees from discussing tips or the Respondent's tip policy on the casino floor or anywhere on the premises." (Appendix, p. 34).

With respect to the Confidential Information policy, the Board granted the NLRB General Counsel's exception, finding that this rule violated Section 8(a)(1) of the NLRA. Although it is obvious on its face that the Confidential Information policy was intended to prohibit employees from discussing "confidential" information about *other* employees received in the course of their employment, and not about their own working conditions, and there was no evidence that the Confidential Information policy had ever been applied more broadly than that (Appendix, p. 50), the Board found that the rule "expressly prohibits discussion of wages and other terms and conditions of employment" and, therefore, violated Section 8(a)(1). (Appendix, p. 32).

In a dissenting opinion, NLRB Chairman Battista agreed that the Tip Policy was overbroad, but noted that where, as here, "the record clearly establishes that the discipline was imposed for conduct that an employer lawfully can proscribe," the discipline does not violate the NLRA. (Appendix, p. 38). Further, Chairman Battista disagreed with the Board's interpretation of the Confidential Information policy, finding that the rule was limited to matters that employers have an interest in protecting (namely disclosure of confidential employee disciplinary, performance, grievance, pay and termination information) and was not aimed at any activity protected under Section 7 of the NLRA. (Appendix, p. 39-40). Thus, the Chairman concluded that the Confidential Information policy did not violate Section 8(a)(1).

3. The Petition For Review To The Court Of Appeals.

The Court of Appeals has jurisdiction to review decisions of the NLRB pursuant to 29 U.S.C. § 160(f). On February 24, 2004, Double Eagle filed a timely Petition for Review with the Tenth Circuit Court of Appeals.

On July 13, 2005, the Court of Appeals issued its opinion, affirming in part and modifying the decision of the Panel. (Appendix, p. 1-21). As an initial matter, the Court of Appeals rejected the Board's broad prohibition against the Tip Policy, noting that in the context of retail establishments, like a casino, an employer has a substantial interest in the treatment of its customers, and solicitation in customer areas "necessarily would directly and substantially interfere with the employer's business." (Appendix, p. 11). Accordingly, the Court held that "Double Eagle can maintain its tips rule so long as it is limited to the casino's gambling area, and adjacent aisles and corridors frequented by customers." (Appendix, p. 12).

With respect to the discipline of Ingerling and the other employees, the Court noted that "the ALJ's findings support Double Eagle's assertion that the disciplinary actions were taken based on discussion of the tip-splitting policy on the casino floor." (Appendix, p. 15). Because the Court concluded that Double Eagle could lawfully prohibit discussion of the tip-splitting issue on the gaming floor, the Court further found: "Therefore, all three employees were disciplined for actions they could have been disciplined for under a lawful tips rule." (Appendix, p. 16).

Despite these findings, the Court *affirmed* the Board's order to offer reinstatement and back pay to Ingerling and back pay to the other employees on the grounds that

Double Eagle's Tip Policy, under which the discipline was imposed, applied not only to the gaming floor, but also to other areas in the casino and hotel. In reaching this conclusion, the Court applied a standard imported from *constitutional law*:

The situation under consideration is analogous to a constitutional overbreadth challenge. Under the overbreadth doctrine, a defendant convicted for acts that may be lawfully proscribed can nonetheless have his conviction overturned by arguing that the statute is unconstitutional because it is overbroad. Courts permit these overbreadth challenges because they facilitate the striking down of laws which have a chilling effect on persons whose actions may not lawfully be proscribed.

* * *

Therefore, we hold that a disciplinary action for violating an unlawful rule is itself a violation of the NLRA. Because we also hold that the tips rule violated § 8(a)(1), Double Eagle's discipline of employees who violated the tips rule violates § 8(a)(3).

(Appendix, p. 16-17).²

² It is important to distinguish between the overbreadth doctrine commonly applied in the context of NLRA cases and the constitutional overbreadth doctrine announced by the Court in this case. In deciding whether maintaining a given rule constitutes an unfair labor practice, the Board and the courts routinely examine the rule to determine whether the rule only prohibits that which an employer may lawfully prohibit. If the rule goes beyond that scope, it is determined to be overbroad and, therefore, unlawful. The result of that analysis in this case was the declaration that the Double Eagle's tip discussion policy was overbroad and unlawful. That is not the determination which is the
(Continued on following page)

With respect to the Confidential Information policy, although the Court noted that "Double Eagle has a significant interest in protecting its confidential information," the Court nevertheless concluded that the Confidential Information policy violates Section 8(a)(1) because it defines "confidential information too broadly." (Appendix, p. 21). Specifically, the Court found that "employees could reasonably interpret [the Double Eagle's policies] to prevent discussion of salary information, and therefore it is also unlawful." (Appendix, p. 20). Thus, under the holding of the Court, the inclusion of salary information as a category of confidential information renders the rule unlawful on its face.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE COURT OF APPEALS' UNWARRANTED IMPORTING OF THE CONSTITUTIONAL "OVERBREADTH" DOCTRINE INTO THE ARENA OF NLRA JURISPRUDENCE TO INVALIDATE EMPLOYMENT DECISIONS BASED ON INDISPUTABLY VALID GROUNDS.

It is undisputed that the Double Eagle Tip Policy prohibited discussion of tip-splitting on the casino gaming floor, and the Court of Appeals expressly acknowledged

subject of this Petition. The Court then went on to *sua sponte* import from criminal constitutional law the doctrine that where a rule (law) is overly broad, all discipline under that rule is conclusively unlawful, regardless of whether the discipline was for conduct that the employer could lawfully prohibit. It is the novel application of that criminal constitutional doctrine by the Court that is the subject of this Petition.

that such a prohibition is proper. (Appendix, p. 13-14). It is further undisputed that Ingerling and the other employees disciplined by Double Eagle violated the Tip Policy by discussing tip-splitting on the gaming floor, and that this violation was the sole reason they were disciplined. The Court of Appeals further acknowledged that employees may properly be disciplined for such conduct. (Appendix, p. 16). The reason Double Eagle was ordered to offer reinstatement and back pay to these employees is that, in addition to regulating conduct on the gaming floor and adjacent aisles and corridors, the Court of Appeals found that the Tip Policy also regulated conduct in other areas of the hotel and casino.³ Since there is no precedent for overturning what is otherwise indisputably valid disciplinary action, the Court of Appeals based its holding on a novel and unwarranted importing of a constitutional overbreadth doctrine as a new element of NLRA jurisprudence.

As an initial matter, the constitutional overbreadth analysis upon which the Court of Appeals based its opinion is inapplicable to claims related to discipline by a private employer for violation of an internal policy. While the Court of Appeals correctly notes that, in a criminal law context, a defendant may have a *criminal conviction* overturned based on an overbroad statute, this is not a case where the government has exercised its coercive powers to deprive a citizen of life, liberty or property. It is well-settled that the protections of the United States

³ Although Double Eagle disputes that its Tip Policy extended to discussions outside the gaming floor and adjacent aisles and corridors, it is not necessary for this Court to review that finding. For purposes of this Petition, this Court may assume that the finding was correct.

Constitution are inapplicable to purely private employment. See, e.g., *Wal-Juice Bar, Inc. v. Elliott*, 899 F.2d 1502, 1507 (6th Cir. 1990) (constitutional protections do not attach to "purely private employment"); *Greenya v. George Washington University*, 512 F.2d 556, 559 (D.C. Cir. 1975) ("the Constitution *proprio vigore* only places limitations on actions undertaken by governmental entities"). Moreover, unlike *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), upon which the Court of Appeals relied, the instant case does not involve any governmental law or ordinance that may chill the exercise of a fundamental First Amendment right. Thus, the constitutional overbreadth doctrine has no application in the context of this case.

Although a facially overbroad no-solicitation rule may constitute a violation of Section 8(a)(1) of the NLRA, there is no precedent for invalidating an employer's disciplinary action based on such a policy where, as here, it is undisputed that the employee was engaged in conduct *that the employer could lawfully proscribe*. In each of the overbreadth cases cited to the Court of Appeals by the NLRB General Counsel, where reinstatement was ordered after an employee was terminated for violating the rule, the employee was either engaged in conduct that was protected by the NLRA or the rule was applied by the employer pretextually or in retaliation for protected conduct. See, e.g., *N.L.R.B. v. McCullough Envt'l Serv., Inc.*, 5 F.3d 923 (5th Cir. 1993); *N.L.R.B. v. Lummus Indus., Inc.*, 679 F.2d 229 (11th Cir. 1982); *N.L.R.B. v. Roney Plaza Apartments*, 597 F.2d 1046 (5th Cir. 1979); *Florida Steel Corp. v. N.L.R.B.*, 529 F.2d 1225 (5th Cir. 1976); *N.L.R.B. v.*

Daylin, Inc., 496 F.2d 484 (6th Cir. 1974).⁴ Because there was no assertion or evidence that Double Eagle applied its rule as a mere pretext, and it was undisputed that the conduct giving rise to the discipline could lawfully be proscribed, these cases are inapposite.

Sections 8(a)(1) and 8(a)(3) of the NLRA were intended to protect employees against retaliation for engaging in protected rights to organize and bargain collectively. See 29 U.S.C. § 158(a). However, these rights must be balanced against the employers' need to control and prevent disruption of their business operations. Accordingly, the Circuit Courts have uniformly recognized that employers may limit discussion of employment-related issues in customer service areas, such as retail sales floors or casino gaming floors. See, e.g., *N.L.R.B. v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980); *Times Pub. Co. v. N.L.R.B.*, 605 F.2d 847 (5th Cir. 1979). The Court of Appeals has disrupted this balance by subjecting legitimate disciplinary action to reversal, absent any evidence that the discipline was imposed pretextually or for any improper purpose.

The Court's unwarranted importing of the criminal constitutional overbreadth doctrine into NLRA jurisprudence disrupts the delicate balance of labor-management relations. It creates significant problems for employers by

⁴ It should not escape this Court's attention that, in two of the cases cited by the NLRB, and in many others, the Circuit Courts have held, despite the existence of an unlawful rule, anti-union animus or discriminatory enforcement, that discharge of an employee was lawful where that discharge "was supported by good cause" (*Florida Steel*, 529 F.2d at 1234) or was action that the employer "would have taken . . . even in the absence of the protected conduct." (*McCullough*, 5 F.3d at 931-932). That issue will be more fully addressed in the following section hereof.

subjecting a wide range of otherwise valid disciplinary action to NLRB reversal if *any part* of a rule is determined to be invalid.

The implications of applying this new doctrine are quite troubling. Under the Tenth Circuit's holding, clearly permissible discipline can be invalidated because other provisions of an employer's rule, which were unrelated to the conduct for which discipline was imposed, are found to be unlawful. Suppose that, instead of having one rule about the discussion of tips, Double Eagle had adopted two separate rules – one that proscribed tips discussions on the gaming floor and another that proscribed tips discussions in all other public areas of the casino. Would the fact that the legal and the illegal proscriptions appeared in two rules, rather than one rule, make the discipline under the valid rule permissible? If so, it demonstrates the shallowness of the Court's newly announced doctrine. If not, where does the doctrine stop? Could an employee or union challenging a particular disciplinary action scrutinize all related policies, or even an employer's entire employee handbook, in search of a provision which a court might find to be overbroad and then have the otherwise lawful disciplinary action overturned on the basis of this new overbreadth doctrine? Unless discipline "for cause" (which focuses exclusively on the conduct of the employee) is preserved as lawful discipline for which reinstatement and back pay cannot be ordered, courts will have tremendous difficulty in determining where to draw the line in declaring otherwise lawful discipline invalid because of the substance of an employer's policies.

An even greater concern is that the ruling announced by the Court in the instant case will open employee discipline to an unprecedented method of attack by employees

and unions, with the incentive that disciplinary action can now be invalidated without any evidence of pretext or anti-union bias. Whenever an employer imposes discipline, employees and unions will immediately search the pertinent policies for perceived imperfections to use in pressuring the employer. The threat of an overbreadth attack will be used to undermine valid and necessary employment decisions. The balance of labor-management relations will be substantially modified by giving employees who were discharged for lawful, legitimate reasons an unprecedented ability to obtain reinstatement and back pay in direct violation of Section 10(c) of the NLRA. Accordingly, this Court should review the Tenth Circuit Court's holding under Rule 10(a) and (c) of the Supreme Court Rules.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE COURT OF APPEALS' ORDER REQUIRING REINSTATEMENT AND BACK PAY BECAUSE IT CONFLICTS WITH SECTION 10(c) OF THE NLRA, CONFLICTS WITH THIS COURT'S DECISION IN *TRANSPORTATION MANAGEMENT CORP.* AND CONFLICTS WITH THE DECISIONS OF ALL OF THE CIRCUIT COURTS OF APPEALS UPHOLDING AND APPLYING THE BOARD'S *WRIGHT LINE* DECISION.

Under the holding announced by the Court in this case, where a rule upon which discipline is based is found to be overbroad in that it contains an unlawful prohibition in addition to any lawful prohibitions, discipline will be deemed *conclusively* unlawful and the remedies of reinstatement and back pay will be upheld, regardless of whether the discipline was for cause or the discipline would have occurred for lawful and valid reasons. That

holding is in direct conflict with the clear mandate of Section 10(c) of the NLRA:

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

This principle is reflected in the Board's *Wright Line* decision which sets forth the standards to be applied in unfair labor practice cases in which there may be both lawful and unlawful motivation for disciplinary action. 251 N.L.R.B. 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). In *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393 (1983), this Court approved the *Wright Line* standards. As to the relevant portion of the *Wright Line* test, this Court stated: "It thus became clear, if it was not clear before, that proof that the discharge would have occurred in any event and for valid reasons amounted to an affirmative defense. . . ." 462 U.S. at 400. Since the time of this Court's holding in *Transportation Management*, all of the Circuit Courts of Appeals have upheld and applied the provision of the *Wright Line* test which allows an employer to avoid liability for reinstatement or back pay in circumstances in which it establishes that the disciplinary action was for cause and would have occurred for lawful and valid reasons, despite the fact that there had been a finding of an unfair labor practice in the case. *See, e.g., N.L.R.B. v. Crafts Precision Industries, Inc.*, 16 F.3d 24, at 27 (1st Cir. 1994); *Torrington Extend-A-Care Emp. Ass'n v. N.L.R.B.*, 17 F.3d 580, at 591 (2nd Cir. 1994); *N.L.R.B. v. Omnitest Inspection Services, Inc.*, 937 F.2d 112, at 122-123 (3rd Cir. 1991); *ARA Leisure Services, Inc. v. N.L.R.B.*, 782 F.2d 456, at 462 (4th Cir. 1986);

N.L.R.B. v. Ryder / P.I.E. Nationwide, Inc., 810 F.2d 502, at 507 (5th Cir. 1987); *N.L.R.B. v. Main Street Terrace Care Center*, 218 F.3d 531, at 540-541 (6th Cir. 2000); *Jet Star, Inc. v. N.L.R.B.*, 209 F.3d 671, at 675 (7th Cir. 2000); *N.L.R.B. v. DBM, Inc.*, 987 F.2d 540, at 542 (8th Cir. 1993); *Humes Elec., Inc. v. N.L.R.B.*, 715 F.2d 468, at 470-471 (9th Cir. 1983); *YMCA of the Pikes Peak Region v. N.L.R.B.*, 914 F.2d 1442, at 1452, n. 10 (10th Cir. 1990); *N.L.R.B. v. McClain of Georgia, Inc.*, 138 F.3d 1418, at 1424 (11th Cir. 1998); *Mohave Electric Cooperative v. N.L.R.B.*, 206 F.3d 1183, at 1187, n. 3; 1192-1193 (D.C. Cir. 2000). This case presents an easier question regarding the application of Section 10(c) than a mixed motive case. If an employer has an affirmative defense in a case where it has been found that one of the motivating factors in the discipline of an employee is unlawful, *a fortiori*, the employer in this case, which had nothing but lawful motivation, must be entitled to that same defense. The Court's application of the criminal constitutional overbreadth doctrine eliminates that defense and, in effect, trumps the clear prohibition of Section 10(c).

The discipline in this case cleanly and compellingly frames an issue that should be addressed by this Court. It does so cleanly because there are no disputed issues of fact on this point. At every level below, it has been confirmed that the employees were disciplined for one thing and one thing only – discussing tips on the casino gaming floor. There are no mixed motives here to cloud the issue. The issue is compellingly framed by this case because it is also beyond dispute that, but for the Court's importing of the constitutional overbreadth doctrine into this NLRA case, it would have found the discipline to be lawful:

[A]ll three employees were disciplined for actions they could have been disciplined for under a lawful tips rule.

(Appendix, p. 16).

The Tenth Circuit's novel application of the constitutional overbreadth doctrine denies the employer the benefit of the affirmative defense under the *Wright Line* test, which has been approved by this Court and applied universally by all of the Circuit Courts of Appeals. Under the Court's ruling in this case, Double Eagle has been ordered to offer reinstatement and back pay, despite the valid reason for its discipline. Absent review and reversal by this Court, any other employer in an overbroad rule case in the Tenth Circuit would be denied the opportunity to demonstrate that the discipline "would have occurred . . . for valid reasons." In addition, and most importantly, the Court's holding directly violates the Section 10(c) mandate that: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." That is precisely what the Court's decision does in this case. It upholds a Board order of reinstatement and back pay where it concedes that the discipline was for lawful cause. This Court should review the Tenth Circuit Court's holding under Rule 10(a) and (c) of the Supreme Court Rules.

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS' RULING WITH RESPECT TO DOUBLE EAGLE'S CONFIDENTIAL INFORMATION POLICY CREATES A CONFLICT AMONG THE CIRCUITS.

Although the Court of Appeals correctly recognized that an employer "has a significant interest in maintaining its confidential information," the Court of Appeals held that Double Eagle's Confidential Information policy violates Section 8(a)(1) of the NLRA because that policy defines confidential information "too broadly" to the extent it included "salary information" and other "terms of employment." (Appendix, p. 21). However, nowhere on the face of the Confidential Information policy does Double Eagle prohibit an employee from sharing or discussing information about an *employee's own* wages, disciplinary information or other information, nor was there any evidence that employees believed the Confidential Information policy restricted their ability to discuss the terms and conditions of their own employment. Moreover, no employee has ever been disciplined for discussing his or her own terms of employment, or for violating the Confidential Information policy.

As an initial matter, Double Eagle's Confidential Information policy applies only to "confidential" information, and not to any general information that an employee may have regarding his or her own circumstances, the company or the company's general conditions of employment. The Court ignored this critical distinction in its Opinion, adopting what is essentially a "bright line" rule that a confidential information policy is unlawful if it forbids disclosure of anything that could fit into the category of "working conditions":

... confidential information cannot be defined so broadly as to include working conditions. Under this holding, Double Eagle's definition of "confidential information" clearly violates § 8(a)(1) because it expressly includes "salary information[,] ... salary grade[, and] ... types of pay increases."

(Appendix, p. 20). Thus, the Court has held that the mere inclusion of salary or pay information on the list of types of confidential information that are not to be disclosed violates the NLRA.

This view contradicts the decisions of other Circuit Courts. In *Community Hospitals v. N.L.R.B.*, 335 F.3d 1079 (D.C. Cir. 2003), for example, the D.C. Circuit held that a rule limited to "confidential" employee information did not violate Section 8(a)(1). In that case, the employer had adopted a policy which prohibited "release or disclosure of confidential information concerning patients or employees." The D.C. Circuit held:

The Board's concern with respect to [the rule] was that employees might understand the "[release] or disclosure of confidential information" to include the revelation of "information concerning terms and conditions of employment, including wages," Order at 5, the sharing of which is useful, indeed perhaps essential, to successful self-organizing. Community again argues the rule must in reason be read more narrowly to prevent disclosure only of "sensitive patient and business information," and not to prohibit discussion with other employees or with union organizers of information about the terms of one's own employment.

Again we agree. The Board's objection to this provision appears to rest chiefly upon the possibility that an employee might believe the rule prohibits him from revealing information, such as wages or a disciplinary record, concerning himself. . . . [T]he rule covers only "confidential" information. Confidential information is information that has been communicated or acquired in confidence. . . . And to the extent an employee is privy to confidential information about another employee or about a patient, he has no right to disclose that information contrary to the policy of his employer.

Id. at 1089. Similarly, in *N.L.R.B. v. Certified Grocers of Illinois*, 806 F.2d 744 (7th Cir. 1986), the Seventh Circuit succinctly summarized the law in this area:

The parties agree that a rule which merely forbids employees with access to confidential information to disclose it without the company's authorization is valid even though an incidental effect may be to make it harder for the union to organize the company's workers. *See, e.g., Texas Instruments, Inc. v. N.L.R.B.*, 637 F.2d 822, 827-832 (1st Cir. 1981); *N.L.R.B. v. Florida Steel Corp.*, 544 F.2d 896, 897 (5th Cir. 1977); *International Business Machines Corp.*, 265 N.L.R.B. 638 (1982). The parties also agree that the company cannot go further and forbid the disclosure of nonconfidential information as well, to the detriment of the union's organizing efforts. *See, e.g., Bullock's*, 247 N.L.R.B. 257, 258 (1980). If Certified had announced that an employee cannot disclose his own name, address, or wages, or the name, address, or wages of any other employee however the information about the other employee was obtained . . . section 8 would have

been violated. *See, e.g., W. R. Grace Co.*, 240 N.L.R.B. 813, 815-816 (1979). Such a rule would impede the union's organizing efforts while serving no lawful interest of either the company or its employees.

Id. at 746. Finally, in *N.L.R.B. v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990), the Fifth Circuit declared:

While section 7 guarantees the employee the right to use information available in the normal course of work activity and association, it does not extend to the unauthorized dissemination of information obtained from an employer's confidential files or records.

Id. at 363. The Tenth Circuit's holding in the instant case is in clear conflict with the rule announced by the Fifth, Seventh and D.C. Circuits in these cases.

Moreover, the Court of Appeals erred in adopting a rule that, if a Confidential Information policy includes matters that may constitute terms of employment, it is *per se* a violation of Section 8(a)(1). This conflicts with the rule adopted by other Circuit Courts, which holds that a confidentiality rule is valid as long as it would reasonably be understood not to prohibit employees from discussing *their own* terms and conditions of employment. This requires an analysis of the confidentiality rule in context. *See Aroostook County Ophthalmology Center v. N.L.R.B.*, 81 F.3d 209, 212 (D.C. Cir. 1996) (examining placement of confidentiality rule in employee handbook in determining scope and intent); *Community Hospitals*, 335 F.3d at 1089 (when viewed in context, a "reasonable employee would not believe that a prohibition upon disclosing information, acquired in confidence, 'concerning patients or employees' would prevent him from saying anything about himself or

his employment.”). Consistent with the NLRA’s declaration that employees have the right to participate in union activities or to refrain from such participation⁵, employees should also have the right to share with others confidential information about themselves, their wages and their discipline or to keep such information confidential. Double Eagle’s Confidential Information rule, like the rules upheld by other Circuit Courts, is aimed at keeping those whose job responsibilities give them access to confidential information from unilaterally taking that right and choice away from other employees.

By adopting a *per se* rule of invalidity whenever a confidentiality rule includes information that may involve terms of employment, without considering whether, in context, the rule is limited to “confidential” information or whether it limits an employee’s ability to discuss his or her own terms of employment⁶, the Tenth Circuit places

⁵ 29 U.S.C. § 157, National Labor Relations Act, Section 7.

⁶ Here, had the Court of Appeals applied the proper standard, the Double Eagle Confidential Information policy would clearly be enforceable. The policy applied only to “confidential” information regarding the company or its employees, and not to general information about working conditions. Further, when viewed as a whole and in context, the Confidential Information policy applies only to sensitive or confidential information obtained through the course of employment, such as access to employee records; no reasonable employee would understand this rule to limit an employee’s right to discuss his or her own working conditions. If any question regarding the scope of this policy existed, employees were encouraged to “[c]heck with management if you have any doubt or questions.” (Appendix, p. 28). Importantly, there was no evidence that this policy had been applied to limit an employee’s Section 7 rights, nor was any employee ever disciplined under this provision for discussing working conditions. The only “evidence” upon which the Court of Appeals relied was the mere speculation of the Board as to a potential chilling effect – which speculation was wholly unsupported by the record.

employers doing business in multiple judicial districts in an untenable position. Because of the divergence of opinion as to what constitutes a valid confidentiality rule, employers will be forced to elect between having *no confidential information policy*, thus putting their business information at risk, or undertaking the expense of having multiple policies depending on where its employees reside. As a result, the Court should grant review under Rule 10(a) of the Supreme Court Rules in order to resolve the conflict among the Circuit Courts.

CONCLUSION

For the foregoing reasons, Petitioner Double Eagle Hotel & Casino respectfully requests that this Court issue a Writ of Certiorari to review the Decision of the United States Court of Appeals in the above-referenced matter.

Respectfully submitted,

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App. 1

PUBLISH

**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

DOUBLE EAGLE HOTEL
& CASINO,

Petitioner-
Cross/Respondent,

v.

NATIONAL LABOR
RELATIONS BOARD,

Respondent-
Cross/Petitioner.

No. 04-9520 & 04-9532

**On Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board
(NLRB Nos. 27-CA-17816-2 and 27-CA-18048-1)**

(Filed July 13, 2005)

Melvin B. Sabey, Kutak Rock, LLP, Denver, Colorado,
appearing for Petitioner/Cross-Respondent.

Ruth E. Burdick, Attorney (Julie B. Broido, Supervisory
Attorney; Arthur F. Rosenfeld, General Counsel; John E.
Higgins, Jr., Deputy General Counsel; John H. Ferguson,
Associate General Counsel; and Aileen A. Armstrong,
Deputy Associate General Counsel, with her on the brief),
National Labor Relations Board, Washington, DC, appear-
ing for Respondent/Cross-Petitioner.

App. 2

Before **TACHA**, Chief Circuit Judge, and **McWILLIAMS** and **HARTZ**, Circuit Judges.

TACHA, Chief Circuit Judge.

Petitioner Double Eagle Hotel & Casino ("Double Eagle") seeks review of an order issued by Respondent National Labor Relations Board ("NLRB" or "Board"). Double Eagle argues that the Board erred in deciding that several rules maintained for its employees violate the National Labor Relations Act ("NLRA"), codified at 29 U.S.C. § 151 *et seq.* The NLRB cross-petitions for enforcement of its order. We have jurisdiction to review, modify, and enforce NLRB orders under §§ 10(e)-(f) of the NLRA. See 29 U.S.C. § 160(e)-(f). We deny Double Eagle's petition and, subject to the modification noted below, grant the NLRB's cross-petition for enforcement of its order.

I. BACKGROUND

Double Eagle operates a hotel and casino in Cripple Creek, Colorado. In the casino, two types of employees interact with the customers playing slot machines: slot technicians and security officers. The slot technicians oversee the operation of the machines, including repairs, while the security officers are in charge of policing the slot area. Each type of employee receives tips from customers and are required by casino policy to share these tips. The manner for sharing tips between slot technicians and security officers is the foundation of the dispute leading to this proceeding.

Prior to May 21, 2001, all tips were pooled with half the tips going to slot technicians and the other half to security officers. Because the slot technicians outnumbered the security officers, a slot technician's share of the tip pool was smaller than a security officer's share. On May 21, in response to complaints from the slot technicians, Double Eagle changed its tip-splitting policy. Under the new policy, tips were not first divided between the different groups of employees. Instead, each slot technician and security officer received an equal share of the total tip pool.

By October 2001, the relative number of slot technicians and security officers had shifted. Because the security officers now outnumbered the slot technicians, the slot technicians sought to revert to the original tip-splitting policy so that they could receive a larger share of the tips. This created friction between the two groups of employees, and as a result, Double Eagle management orally issued a rule prohibiting discussion of the tip-splitting policy. After a number of incidents in which the slot technicians expressed their dissatisfaction over the tip-splitting policy, including one in which a slot technician violated the tip rule, one technician was fired and two others were suspended. Alleging violations of the NLRA, the employees' union, International Brotherhood of Electrical Workers, Local No. 113, initiated administrative proceedings against Double Eagle.

Although the administrative law judge ("ALJ") found that Double Eagle committed numerous violations of the NLRA, we limit our discussion to the few issues that

Double Eagle raises in its petition for review.¹ The ALJ held that the tips rule violated § 8(a)(1) of the NLRA.² As a result, the ALJ held that the employees who were disciplined for violating this rule had been unlawfully punished. The ALJ also ordered Double Eagle to cease and desist from maintaining a rule prohibiting discussion of the tip-splitting policy on the casino floor and to offer reinstatement and back pay to the disciplined employees. Double Eagle appealed this order and the Board affirmed on these issues. The Board further held that Double Eagle's "Customer Service," "Confidential Information," and "Communication" rules violated § 8(a)(1). Double Eagle timely petitions for review of the Board's decision and the NLRB cross-petitions for enforcement of the order.

II. DISCUSSION

A. Standard of Review

Section 10 of the NLRA, which grants this Court jurisdiction to consider Double Eagle's petition, requires that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e). "Substantial evidence is such relevant evidence

¹ In its reply brief, Double Eagle concedes that it has waived any objection to the other aspects of the NLRB's order.

² Section 7 of the NLRA guarantees employees the right to unionize. See 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing. . . ."). Section 8(a)(1) protects this right by prohibiting employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of [their § 7] rights." 29 U.S.C. § 158(a)(1). Thus, an employer violates § 8(a)(1) of the NLRA by interfering with its employees' right to unionize.

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as a reasonable mind might accept as adequate to support a conclusion. Accordingly, if supported by substantial evidence, we must affirm the Board's conclusions even though we might reach a different result were we reviewing the record de novo." *Pub. Serv. Co. of Colo. v. N.L.R.B.*, 405 F.3d 1071, 1077 (10th Cir. 2005) (internal quotation marks omitted).

Although the NLRA does not expressly state a standard of review for the Board's legal determinations, our review is clearly established by existing case law. We give deference to the Board's interpretation of the NLRA. "For the Board to prevail, it need not show that its construction is the best way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one." *Four B Corp. v. N.L.R.B.*, 163 F.3d 1177, 1182 (10th Cir. 1998) (quotations and emphasis omitted). We review de novo any other legal determinations made by the Board "to determine whether the Board correctly interpreted and applied the law." *Id.* (quotations omitted).

B. Customer Service Rule

We begin our review by discussing a rule maintained by Double Eagle entitled "Customer Service," as the analysis is relevant to our discussion of the tips rule. The customer service rule, contained in Double Eagle's employee handbook, states:

Never discuss Company issues, other employees, and personal problems to or around our guests. Be aware that having a conversation in public areas with another employee will in all probability be overheard.

The Board held that this rule overly restricted the employees' ability to discuss work-related issues and therefore violated § 8(a)(1). Double Eagle petitions for review of this holding, arguing that the Board erred because it misinterpreted the scope of its rule.

The Board began its analysis of the customer service rule by recognizing that "[a] rule like the one at issue here, which prohibits employees from discussing working conditions, is viewed by the Board as analogous to a no-solicitation rule for purposes of considering its legality." *Double Eagle Hotel & Casino and Int'l Brotherhood of Electrical Workers, Local No. 113*, 341 N.L.R.B. No. 17 at 2 (Jan. 30, 2004). The right to solicit employees to join the union is guaranteed by § 7 because self-organization could not occur without the ability to solicit. The right to solicit, however, is not absolute. As the Ninth Circuit has recognized, "the right of employees to solicit or distribute materials must be balanced against an employer's right to maintain discipline in its establishment." *N.L.R.B. v. Silver Spur Casino*, 623 F.2d 571, 582 (9th Cir. 1980) (citing *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 797-98 (1945)).

In *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483 (1978), the Supreme Court discussed how this balancing occurs in retail industries:

In the retail marketing and restaurant industries, the primary purpose of the operation is to serve customers, and this is done on the selling floor of a store or in the dining area of a restaurant. Employee solicitation in these areas, if disruptive, necessarily would directly and substantially interfere with the employer's business. On the other hand, it would be an unusual store or

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restaurant which did not have stockrooms, kitchens, and other nonpublic areas, and in those areas employee solicitation of nonworking employees must be permitted.

Id. at 506. Based on this reasoning, the Ninth Circuit held in *Silver Spur* that a casino – which it found more akin to a retail than non-retail industry – could prohibit solicitation in its gambling area, restaurant, and bar. 623 F.2d at 583.

Upon determining that the customer service rule should be treated as a no-solicitation rule, the Board held that Double Eagle “lawfully could prohibit employees from soliciting each other and discussing their working conditions in the casino’s gambling areas, and adjacent aisles and corridors frequented by customers, but it could not maintain a general ban on that activity beyond that area.” 341 N.L.R.B. No. 17 at 2. Double Eagle does not dispute this interpretation of the NLRA.³ Instead, it contends that its customer service rule complies with this requirement and that the Board erred in interpreting its rule more broadly.

The Board interpreted the customer service rule to “prohibit[] discussion in ‘public areas.’” Thus, for example, the rule would bar discussions in such public areas as parking lots and restrooms.” *Id.* Because the prohibition on discussing employment-related issues was not limited to the gaming floor and adjacent corridors, the Board held

³ Nonetheless, we have independently reviewed the Board’s interpretation and find it reasonable in light of a number of Circuit Court decisions interpreting the NLRA similarly. See, e.g., *N.L.R.B. v. Silver Spur Casino*, 623 F.2d 571, 583 (9th Cir. 1980).

that the rule was overly broad and therefore violated § 8(a)(1).

Double Eagle objects to the Board's interpretation of this rule because the rule does not state that employees cannot discuss company issues in "public areas." The term "public areas" appears only in the second sentence of the rule, and this second sentence does not prohibit any discussion – it merely cautions employees that guests will likely overhear any conversation held in public areas. The rule properly interpreted, Double Eagle argues, does not prohibit all discussion of company issues in "public areas" because the employees can discuss issues when guests are not around.

Double Eagle's interpretation is more consistent with the text of the rule. Nonetheless, even under this interpretation, the rule violates § 8(a)(1). The rule's first sentence, which prohibits discussion of company issues, contains nothing to limit the scope of its application. Under this rule, the presence of a single guest can transform an area in which employees have a right to discuss work conditions, such as the parking lot or break room, into a place where discussion is prohibited. While existing case law permits a casino to limit employees' discussions on the gaming floor, *see, e.g., Silver Spur*, 623 F.2d at 583, no court has interpreted the NLRA to permit an employer to adopt a no-discussion rule that follows each of its customers. We therefore hold that even accepting Double Eagle's interpretation of its customer service rule, the rule is unlawfully broad.

C. Tips Rule

Double Eagle also argues that the Board erred in holding its unwritten rule prohibiting discussion of the tip-splitting policy violated § 8(a)(1). Double Eagle contends that its rule is lawful because it only prohibits discussion of the tip-splitting policy on the casino floor, not in other areas. The Board's opinion did not discuss the tips rule; instead, it simply adopted the reasoning given by the ALJ. See 341 N.L.R.B. No. 17 at 1 n.6 ("For the reasons set forth by the judge, we agree with the judge that the Respondent's oral rule, proscribing the discussion of tips and its tip policy anywhere on the Respondent's property, is overly broad and unlawful."). We therefore look to the ALJ's decision to review this issue.

Double Eagle argued before the ALJ that the tips rule only prohibited discussion of the tip-splitting policy on the casino floor and that this rule was necessary to avoid disrupting its customers. The ALJ rejected these arguments. The judge found that the tips rule "was not limited to the gaming floor but was general – anytime, anywhere on company property." *Double Eagle Hotel & Casino and Int'l Brotherhood of Electrical Workers, Local No. 113*, Nos. 27-CA-17816-2 and 27-CA-18048-1, slip op. at 3 (N.L.R.B. Div. of Judges Mar. 3, 2003). Additionally, the judge held that "even if the rule was simply limited to the gaming floor" the rule would be unlawful. *Id.*

In arriving at this conclusion, the ALJ acknowledged that existing precedent permitted a casino to prohibit solicitation on the gaming floor. The judge, however, relied on cases recognizing "a distinction between 'talking' and 'solicitation.'" *Id.* (quoting *W.W. Granger, Inc.*, 229 N.L.R.B. 165 (1997)). Based on this distinction, the ALJ

concluded that "prohibit[ing] employees from discussing matters pertaining to unionization while on duty, but allowing discussion of other matters, violates Section 8(a)(1)." *Id.* (citing *Teledyne Advanced Materials*, 332 N.L.R.B. No. 53 (2000)). Thus, the ALJ rejected analyzing the tips rule under the no-solicitation case law and held that Double Eagle could not prohibit discussion of the tip-splitting policy at all.

We disagree. The rule's legality must be considered in the context of no-solicitation, as opposed to no-discussion, precedent. To begin, we note that the customer service rule – the first rule discussed above – was properly treated by the Board as a no-solicitation rule because it "prohibit[ed] employees from discussing working conditions." 341 N.L.R.B. No. 17 at 2. The tips rule is identical in this respect – it prohibits employees from discussing a policy that directly affects their income. We also note that both parties rely on no-solicitation cases in addressing the rule.

Moreover, the no-discussion cases relied on by the ALJ arose in a non-retail context, whereas a casino is more appropriately considered a retail environment. See *Silver Spur*, 623 F.2d at 583. We think the distinction between the two contexts is important for the following reasons. As discussed above, when considering rules which restrict employees' § 7 rights, employees' right to self-organize must be balanced against the employer's right to operate its business. See *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 797-98 (1945). In work areas where no customers are present, the employees' productivity is of primary concern. Consequently, "an employer may implement rules against solicitation during work hours to prevent interference with work productivity." *Wal-Mart Stores, Inc. v. N.L.R.B.*, 400 F.3d 1093, 1099 (8th Cir. 2005).

When worker productivity is the primary concern, no-discussion rules should be distinguished from no-solicitation rules. *See id.* (quoting *W.W. Grainger, Inc.*, 229 N.L.R.B. 161, 166 (1977)). Such a distinction is sensible because discussion of union activities is often less disruptive than solicitation and therefore has a less significant impact on worker productivity. The Board's decisions also properly recognize that employees' discussions can adversely affect productivity and therefore may be limited. Indeed, an employer may adopt a no-discussion rule; however, the rule must apply to *all* topics, not simply those related to the job. *See Teledyne Advanced Materials*, 332 N.L.R.B. No. 53 at 1 ("It is well established that an employer violates Section 8(a)(1) when, as here, employees are forbidden to discuss unionization while working, but are free to discuss other subjects unrelated to work."). This rule prohibits an employer from discriminating against union discussions under the pretext of increasing worker productivity. If worker productivity is really the concern, then all non-work-related discussions should be prohibited because these topics all interfere with the employees' work equally.

In restaurants, bars, casinos, and other retail stores, however, the employer's interest is not limited to productivity, but also includes the treatment of its customers. *Cf. Beth Israel*, 437 U.S. at 506 ("In the retail marketing and restaurant industries, the primary purpose of the operation is to serve the customer."). As a result, "[e]mployee solicitation [on the selling floor of a store or in the dining area of a restaurant], if disruptive, necessarily would directly and substantially interfere with the employer's business." *Id.* Therefore, when the enjoyment of the customer is at issue — as it is in the retail and service

context – there is less of a reason to treat solicitation and discussion differently because both could prove equally disruptive to the customer. Consequently, the Board's decisions treat no-discussion and no-solicitation rules identically in this context. See, e.g., *Aroostook County Regional Ophthalmology Ctr.*, 317 N.L.R.B. 218, 218 n.4 (1995) (treating a rule that prohibited discussion of grievances "within earshot of patients" as a no-solicitation rule). Because the tips rule was adopted in a retail setting for the purpose of preventing discussion of working conditions around customers, we conclude that the tips rule must be considered under the same legal standard as the customer service rule. Thus, contrary to the ALJ's conclusion, Double Eagle can maintain its tips rule so long as it is limited to the casino's gambling area, and adjacent aisles and corridors frequented by customers.

Double Eagle contends that the rule was so limited, and that it merely stated that employees could not discuss tip-splitting while on the casino floor. The ALJ, however, found that the tips rule prohibited discussion of the tip-splitting policy anywhere on the premises. Double Eagle therefore argues that the Board, by adopting the ALJ's decision, erred in finding that the rule extended beyond the casino floor and that it could not maintain its tips rule limited in this way.

Whether the tips rule applied only on the casino floor or more broadly is a question of fact. We therefore review the record to determine whether the Board's finding is supported by substantial evidence. See 29 U.S.C. § 160(e); *N.L.R.B. v. Interstate Builders, Inc.*, 351 F.3d 1020, 1027 (10th Cir. 2003). No fewer than four employees testified before the ALJ that the tips rule extended beyond the casino floor. See Tr. at 165 ("We were told that we couldn't

discuss tips . . . on the floor, in the break room, locker room, anywhere.") (testimony of Carol Marthaler); *id.* at 95 (employees could not discuss the tip-splitting policy on "[t]he gaming floor, break room, [or] bathrooms.") (testimony of Betty Ingerling); *id.* at 187 ("You were not to talk about tips on the premises.") (testimony of Lowell Moses); *id.* at 193 ("We were not to discuss [the tip-splitting policy] on the floor, break room, out back in our smoking area, anyplace within the building.") (testimony of Larry Custer).

Although there was also testimony to the contrary, the substantial evidence standard of review does not permit us to question the Board's balancing of this conflicting evidence. See *Four B Corp.*, 163 F.3d at 1182. The Board's conclusion that the tips rule applied beyond the casino floor is supported by substantial evidence and therefore we accept this factual finding. Thus, because we interpret § 8(a)(1) to prohibit a no-solicitation rule of this breadth, we deny Double Eagle's petition on this issue.

Although we hold that the tips rule violated § 8(a)(1), we must exercise our authority to modify the Board's order. See 29 U.S.C. § 160(f) (granting courts of appeals jurisdiction to "enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board"). The order requires Double Eagle to "[c]ease and desist from [m]aintaining a rule prohibiting employees from discussing tips or the Respondent's tip policy on the casino floor." Yet the rule announced by the Board with respect to the customer service rule also applies to the tips rule, and therefore "the Respondent lawfully [can] prohibit employees from . . . discussing their working conditions in the casino's gambling area, and adjacent aisles and corridors frequented by

customers, but it [cannot] lawfully maintain a general ban on that activity beyond that area." We therefore modify the order so that it is consistent with the law. The order shall be modified to require Double Eagle to cease and desist from:

Maintaining a rule prohibiting employees from discussing their working conditions outside of the casino's gambling area and adjacent aisles and corridors frequented by customers.

D. Disciplinary Action Taken Against Employees

Three employees were disciplined for violating the tips rule. Because the Board determined that this rule violated § 8(a)(1), it held that these disciplinary actions were also unlawful. To remedy this violation, the Board ordered Double Eagle to offer reinstatement and back pay to these employees. Double Eagle objects to this part of the order, arguing that the employees were disciplined for conduct that it could lawfully proscribe: discussing the tip-splitting policy while on the casino floor.

Section 8(a)(3) of the NLRA prohibits employers from "discriminat[ing] in regard to hire or term of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Under this provision, an employer is prohibited from disciplining an employee who has exercised rights protected by § 7.

Section 8(a)(3) violations arise when an employer has disciplined an employee for breaking a rule that the Board determines violates § 8(a)(1). In this case, the Board held that the discipline violated § 8(a)(3) because the employees were punished for violating the tips rule, which it held was

unlawfully broad. An overbroad rule, by definition, encompasses both activity which can be lawfully proscribed and activity which cannot. Relying on its own precedent, a majority of the Board concluded that this distinction makes no difference. The Board held that "where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule." 341 N.L.R.B. No. 17 at 1 n.3.

Chairman Battista wrote separately on this question, stating that he "would not find that *all* discipline imposed pursuant to an overbroad rule is necessarily unlawful." *Id.* at 6. Instead, the Chairman would determine whether a disciplinary action was unlawful on a case-by-case basis and the punishment would not violate § 8(a)(3) "where the record clearly establishes that the discipline imposed was for conduct that an employer lawfully can proscribe, and the employer makes clear to the employees that their discipline is for this conduct." *Id.*

Double Eagle argues that we should adopt Chairman Battista's position, and because it only punished employees who had discussed tips on the casino floor, the disciplinary actions did not violate § 8(a)(3). We first note that the ALJ's findings support Double Eagle's assertion that the disciplinary actions were taken based on discussion of the tip-splitting policy on the casino floor. With respect to the discharged employee, Betty Ingerling, the ALJ found that "[t]here is no doubt from Respondent's admissions that absent Ingerling discussing the tip policy on the casino floor she would not have been discharged." *Double Eagle*, slip op. at 10. In discussing the suspended employees, Carol Marthaler and Barbara McCoy, the ALJ stated that "[t]he Respondent admits that Marthaler and McCoy were

discharged because they talked on the gaming floor about [a tip issue in] violation of the Respondent's rule prohibiting such discussions." *Id.* Therefore, all three employees were disciplined for actions that they could have been disciplined for under a lawful tips rule.

Although we think Chairman Battista makes a strong argument, we adopt the view of the Board's majority. Our decision is based in large part on the amount of deference we are required to give to the Board's interpretation of the NLRA. Even if we think Chairman Battista presents the best reading of the statute, we must accept the majority's interpretation if it is a "reasonable one." *See Four B Corp.*, 163 F.3d at 1182 ("For the Board to prevail, it need not show that its construction is the best way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one.") (quotations and emphasis omitted).

We conclude that the Board's interpretation is reasonable. By adopting the rule that all disciplinary actions imposed pursuant to an unlawful rule are unlawful, the Board reduces the chilling effect that results from imposition of overbroad rules. The situation under consideration is analogous to a constitutional overbreadth challenge. Under the overbreadth doctrine, a defendant convicted for acts that may be lawfully proscribed can nonetheless have his conviction overturned by arguing that the statute is unconstitutional because it is overbroad. Courts permit these overbreadth challenges because they facilitate the striking down of laws which have a chilling effect on persons whose actions may not be lawfully proscribed. As the Supreme Court explained in *Brockett v. Spokane Arcades, Inc.*:

[A]n individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.

472 U.S. 491, 503 (1985).

Similar interests are present here. The Board has previously recognized the need to protect employees from rules that have a chilling effect on the exercise of their rights. In *Lafayette Park Hotel*, the Board noted that “[w]here the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.” 326 N.L.R.B. 824, 825 (1998); *see also N.L.R.B. v. Vanguard Tours*, 981 F.2d 62, 67 (2d Cir. 1992) (holding that an overbroad rule was unlawful because of the “likely chilling effect of such a rule”).

Therefore, we hold that a disciplinary action for violating an unlawful rule is itself a violation of the NLRA. Because we also hold that the tips rule violated § 8(a)(1), Double Eagle’s discipline of employees who violated the tips rule violates § 8(a)(3). We therefore deny Double Eagle’s petition requesting modification of the order with respect to offering reinstatement and back pay to employees Ingerling, Marthaler, and McCoy.

E. Confidentiality Rules

Double Eagle also petitions for review of the Board's determination that two of its rules restricting dissemination of confidential information violate § 8(a)(1). The Board held that Double Eagle's "Confidential Information" and "Communication" rules are unlawful because they restrict employees' right to discuss wages and other terms of employment. Double Eagle argues that the rules, properly interpreted, place no such limitation on its employees.

In its employee handbook, Double Eagle maintains a rule establishing its policy regarding confidential information. The rule states:

CONFIDENTIAL INFORMATION

Pursuant to Company policy . . . you may be required to deal with many types of information that are extremely confidential and with the utmost discretion must be observed. It is essential that no information of this kind is allowed to leave the department, other than by activity/job requirement, either by documents or verbally. A list, which is not all-inclusive, of the types of information considered confidential is shown below:

- disciplinary information
- grievance/complaint information
- performance evaluations
- salary information
- salary grade
- types of pay increases

- termination data for employees who have left the company

Information should be provided to employees outside the department or those outside the Company only when a valid need to know can be shown to exist.

The casino's "Communication" rule incorporates this definition of confidential information and states that, without prior approval of management, an employee is not, "under any circumstances, permitted to communicate any confidential or sensitive information concerning the Company or any of its employees to any non-employee."

In *Lafayette Park Hotel*, the Board discussed how employer confidentiality rules should be balanced against employees' § 7 rights. The Board noted that "businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information." 326 N.L.R.B. at 826. Because of this interest, the Board in *Lafayette Park Hotel* held that a rule preventing employees from divulging "hotel-private" information did not violate § 8(a)(1). *Id.* The employer's interest in confidentiality, however, is outweighed by employees' need to discuss their terms of employment, and thus "employers may not prohibit employees from discussing their own wages or attempting to determine what other employees are paid." *Id.* In addition, when a confidentiality provision is reasonably interpreted to prevent employees from discussing working conditions, the Board has held that rule is unlawful. *See, e.g., IRIS, U.S.A., Inc.*, 336 N.L.R.B. 1013 (2001).

In reviewing orders from the NLRB, the D.C. Circuit has adopted this framework. In *Aroostook County Ophthalmology Ctr.*, the court stated that "[t]here can be no quarrel with the claim that, under the NLRA, employees are generally free to discuss the terms and conditions of their employment." 81 F.3d 209, 212 (D.C. Cir. 1996).⁴ Similarly, in *Brockton Hospital v. NLRB*, the court struck down a confidentiality rule because it limited employees' ability to discuss "wages, hours, and working conditions – the very stuff of collective bargaining." 294 F.3d 100, 107 (D.C. Cir. 2002).

We agree with the Board and the D.C. Circuit that a company has a significant interest in maintaining its confidential information, but that confidential information cannot be defined so broadly as to include working conditions. Under this holding, Double Eagle's definition of "confidential information" clearly violates § 8(a)(1) because it expressly includes "salary information[,] . . . salary grade[, and] . . . types of pay increases." Furthermore, because the "Communication" rule prohibits communicating "confidential information," employees could reasonably interpret it to prevent discussion of salary information, and therefore it is also unlawful.

⁴ Double Eagle cites *Aroostook County* to support its claim that its confidentiality rules do not violate § 8(a)(1). *Aroostook County*, however, is easily distinguishable. The confidentiality provision in that case involved patients' medical records. The D.C. Circuit permitted this confidentiality provision "because the rule in question in no way precludes employees from conferring with or seeking support from family and friends with respect to matters directly pertaining to the employees' terms and conditions of employment." *Aroostook County*, 81 F.3d at 212-13.

Although Double Eagle has a significant interest in protecting its confidential information, its "Confidential Information" and "Communication" rules violate § 8(a)(1) because they define confidential information too broadly. We note, however, that the Board's order only prohibits Double Eagle from maintaining confidentiality rules that "prohibit employees from discussing with nonemployees or among themselves wages, hours, and other terms and conditions of employment." 341 N.L.R.B. No. 17 at 2. As such, Double Eagle is free to modify its rules so that its interests are protected and the employees' § 7 rights are not violated.

III. CONCLUSION

For the foregoing reasons, we deny Double Eagle's petition and grant the NLRB's cross-petition for enforcement, subject to the modification pertaining to the tips rule.

ENTERED FOR THE COURT,

Deanell Reece Tacha
Chief Circuit Judge

National Labor Relations Board

**Double Eagle Hotel & Casino and International
Brotherhood of Electrical Workers, Local No. 113.
Cases 27-CA-17816-2 and 27-CA-18048-1**

January 30, 2004

DECISION AND ORDER

**BY CHAIRMAN BATTISTA AND
MEMBERS LIEBMAN AND WALSH**

On March 3, 2003, Administrative Law Judge James L. Rose issued the attached decision. The Respondent and the General Counsel each filed exceptions, supporting briefs, and answering briefs. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to

¹ The Respondent filed no exceptions to the judge's findings that it violated Sec. 8(a)(1) by maintaining a rule prohibiting employees from being on its property unless they were working their scheduled shift; by maintaining a rule prohibiting employees from providing information about the Respondent to the media without its prior approval; and by threatening to call, and then calling, the police to have handbilling union members removed from public sidewalks adjacent to its casino.

The General Counsel filed no exceptions to the judge's dismissal of 8(a)(1) allegations that Slot Director Rodger Hostetler orally promulgated a rule on October 26, 2002, prohibiting employees from discussing tips or company problems, and threatened employees with discharge if they violated the rule; that security lead, Chuck Robertson, promulgated a rule on March 23, 2002, forbidding employee Tina Tonks from speaking to employee Sherry at any time about any subject; that lead key, Leslie Blevins, threatened employee Betty Ingerling with discharge for complaining about employee Henderson keeping her tips rather

(Continued on following page)

affirm the judge's rulings, findings,² and conclusions³ as modified and to adopt the recommended Order as modified and set forth in full below.

than placing them in a common tip box; that Hostetler and Blevins impliedly threatened an employee by telling her that another employee was discharged because she was an instigator and spokesperson for other employees concerning working conditions; that Hostetler impliedly threatened employee Ingerling by telling her to cease her attempts to obtain changes in the tip policy; that head key, Denny Warrick, impliedly threatened employees with unspecified reprisals by his remark to Robertson, in the presence of employee Tonks, that "this union thing is getting out of hand;" and that employee Tonks was suspended for violating the unlawful rule concerning the discussion of tips.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found, as alleged in par. 5(1) of the amended consolidated complaint, that the Respondent violated Sec. 8(a)(1) by impliedly threatening employees with discharge if they attempted to change the Respondent's policy regarding the distribution of tips. However, as correctly noted by the Respondent, and conceded by the General Counsel (Answer Br. at 18), this allegation was withdrawn at the hearing. Accordingly, we reverse the judge's finding of this 8(a)(1) violation.

The judge found that because Supervisor Robertson did not specifically deny telling employee Tonks that anyone caught talking about employee Ingerling's discharge would be disciplined, Robertson's remark constituted an 8(a)(1) threat. The Respondent argues in exceptions that Robertson did specifically deny making the remark and, therefore, the violation should be reversed. We find it unnecessary to pass on this 8(a)(1) finding, as it is cumulative of other 8(a)(1) threats of discipline which the judge found, and with which we agree, and would not affect the remedy.

³ For the reasons stated by the judge, we agree that the Respondent violated Sec. 8(a)(3) by disciplining employees Betty Ingerling,

(Continued on following page)

1. The amended consolidated complaint alleges, *inter alia*, that several rules in the Respondent's employee handbook violate the Act. The judge found unlawful a section of the handbook's "Communication" rule that prohibited employees from "provid[ing] information about the company to the media."⁴ There are no exceptions to this finding and, therefore, we adopt *pro forma* the judge's finding of a violation. Contrary to the judge, however, we find that another section of the Communication rule is also unlawful and as discussed in sections 2 and 3 below, that sections of the handbook's "Confidential Information" rule are unlawful.⁵ Finally, in disagreement with the judge, we find that a section of the handbook's "Customer Service" rule is unlawful.⁶

The Respondent operates a gambling casino in Colorado. It employs slot technicians, slot attendants, security officers, cage cashiers, cocktail waitresses, and bartenders. In performing their duties, these employees interact with

Carol Marthaler, and Barbara McCoy. We note that our colleague's analysis of this discipline under the concurring opinion in *Saia Motor Freight Line*, 333 NLRB 784, 785-786 (2001), applies principles contrary to extant Board law. Thus, where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule. *Opryland Hotel*, 323 NLRB 723, 728 (1997), citing *NLRB v. McCullough Environmental Services*, 5 F. 3d 923, 931 fn. 9 (5th Cir. 1993).

⁴ See sec. III,B,3 of the judge's decision.

⁵ For the reasons discussed in his partial concurring and dissenting opinion, *infra*, Chairman Battista finds neither of the disputed sections of these two rules unlawful.

⁶ For the reasons set forth by the judge, we agree with the judge that the Respondent's oral rule, proscribing the discussion of tips and its tip policy anywhere on the Respondent's property, is overly broad and unlawful.

customers of the casino on a regular basis including paying out jackpots to them, checking their identification, or serving them drinks.

In connection with these duties, the Respondent's Customer Service rule sets out 12 employee guidelines to be followed when interacting with customers. One of the guidelines states:

Never discuss Company issues, other employees, and personal problems to or around our guests. Be aware that having a conversation in public areas with another employee will in all probability be overheard.

In dismissing the allegation that this provision violated Section 8(a)(1), the judge stated that he found "nothing in this rule which unlawfully prohibits employees from discussing working conditions among themselves on the casino floor." The General Counsel excepts, contending that the rule is not limited to the casino floor; its prohibition against discussing "company issues" and "other employees" reasonably encompasses wages and working conditions; and, contrary to the judge, the prohibition extends beyond the casino floor to all "public areas." Accordingly, the General Counsel argues that this rule is unlawfully overbroad. We find merit in the General Counsel's exception and find the violation.

A rule like the one at issue here, which prohibits employees from discussing working condition, is viewed by the Board as analogous to a no-solicitation rule for purposes of considering its legality. See *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 fn. 4 (1995), enf. denied on other grounds 81 F.3d 209 (D.C. Cir. 1996). Over the years, the Board has carved out, for certain industries, special rules for assessing the legality

of employee no-solicitation rules. In the retail industry, for example, the Board has held that because active solicitation in a sales area may disrupt a retail store's business, an employer legally may prohibit solicitation by employees on the selling floor even during the nonworktime of the employees. *J.C. Penney Co.*, 266 NLRB 1223 (1983); *Marshall Field & Co.*, 98 NLRB 88 (1952). But as stated in *McBride's of Naylor Road*,⁷ in applying this precedent, the Board "has not allowed the restrictions on solicitation . . . to be extended beyond that portion of the store which is used for selling purposes," such as public restrooms and restaurants.

Gambling casinos, such as the one that the Respondent operates, have long been considered akin to retail stores for purposes of assessing the legality of employee no-solicitation rules. *Dunes Hotel*, 284 NLRB 871, 875 (1987); *Santa Fe Hotel & Casino*, 331 NLRB 723, 729 (2000). Thus, as with a retail store's selling floor, the Respondent lawfully could prohibit employees from soliciting each other and discussing their working conditions in the casino's gambling areas, and adjacent aisles and corridors frequented by customers, but it could not lawfully maintain a general ban on that activity beyond that area. To the extent that the rule pertains to discussions with or around casino guests, it is likely the case that casino guests are in gambling areas or in adjacent aisles and corridors. However, the rule goes further and prohibits discussions in "public areas." Thus, for example, the rule would bar discussions in such public areas as parking lots and restrooms. Although the rule suggests that there

⁷ 229 NLRB 795 (1977).

is a "probability" that conversations will be overheard by guests in *all* public areas, there is no evidence to support this, and it seems counterintuitive. That is, there are surely times and places in the public areas outside the gaming floor where customers are not in earshot. Nevertheless, conversations are broadly barred in these areas. Accordingly, the rule is unlawful at least to the extent that it bars discussion in places outside the gaming area, such as, for example restrooms, public bars and restaurants, sidewalks and parking lots. See *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 (1999); *Santa Fe Hotel & Casino*, 331 NLRB at 729.

2. We also find merit in the General Counsel's exception to the judge's finding that the highlighted provisions in the following two handbook rules are not unlawful:

CONFIDENTIAL INFORMATION

Pursuant to Company policy . . . you may be required to deal with many types of information that are extremely confidential and with the utmost discretion must be observed. It is essential that no information of this kind is allowed to leave the department, other than by activity/job requirements, either by documents or verbally. A list, which is not all-inclusive, of the types of information considered confidential is shown below:

- disciplinary information
- grievance/complaint information
- performance evaluations
- salary information

- salary grade
- types of pay increases
- termination data for employees who have left the company

Information should be provided to employees outside the department or to those outside the Company only when a valid need to know can be shown to exist. Check with Management if you have any doubt or questions.

Unless there is a need for it in the normal course of business, personal information concerning individual employees should not be discussed with members of your own group.

Working with confidential information on a day-to-day basis requires a continuing effort on your part to ensure that no paperwork is inadvertently left someplace where unauthorized people may gain access, and that visitors to the department are not allowed to observe or study confidential information on and/or around your desk.

Any breach or violation of this policy will lead to disciplinary action up to and including termination.

COMMUNICATION

PRESS RELATIONS

Without appropriate approval, under no circumstances shall you provide information about the company to the media.

The external communications of our employees are critical to the way the Company is perceived by guests, business associates, the press, regulators and the general public. . . . **You are not, under any circumstances, permitted to communicate any confidential or sensitive information concerning the Company or any of its employees to any non-employee without approval from the General Manager or the President.**

Applying the test set forth in *Lafayette Park Hotel*,⁹ the judge rejected the General Counsel's contention that both rules unlawfully prohibit employees from engaging in the Section 7 right to discuss wages and other terms and conditions of their employment. The judge found that neither rule on its face specifically prohibits such discussions and that employees who read the rules would not reasonably conclude otherwise. Contrary to the judge, we find both rules unlawful under the standard set forth in *Lafayette Park Hotel*. It is hard to imagine a rule that more explicitly restricts discussion of terms and conditions of employment than the Confidential Information rule herein.

In that case the Board held that in determining whether the maintenance of work rules in employer-issued handbooks violated the Act:

the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an

⁹ 326 NLRB 824 (1998), *enfd. mem.* 203 F.3d 52 (D.C. Cir. 1999).

unfair labor practice, even absent evidence of enforcement. [326 NLRB at 825.]

Several work rules were analyzed under this standard in *Lafayette Park Hotel*, including a confidentiality rule that prohibited employees from “[d]ivulging hotel-private information to employees or other individual or entities that are not authorized to receive that information.” A Board majority found this rule lawful, noting that it was not facially ambiguous and that employees reasonably would understand that the rule was designed to protect the employer’s interest in maintaining confidentiality of its business information, rather than to prohibit discussion of wages and working conditions. Similarly, in *Super K-Mart*,⁹ a Board majority found that, under the standard of *Lafayette Park Hotel*, the employer’s confidentiality rule, which provided that “[c]ompany business and documents are confidential [and] [d]isclosure of such information is prohibited,” did not violate Section 8(a)(1).¹⁰

However, applying *Lafayette Park*, the Board found unlawful employer confidentiality rules in *Flamingo Hilton-Laughlin*,¹¹ *University Medical Center*,¹² and *IRIS*

⁹ 330 NLRB 263 (1999).

¹⁰ Member Liebman dissented in both *Lafayette Park* and *Super K-Mart*. Contrary to the majority in both of those cases, she found that the respondents’ confidentiality rules were unlawfully overbroad. Member Walsh did not participate in *Lafayette Park* or *Super K-Mart*; however, he agrees with Member Liebman’s dissenting positions in those cases. *Mediaone of Greater Florida, Inc.*, 340 NLRB No. 39 (2003) (dissent). Notwithstanding their positions, Members Liebman and Walsh agree that under either the majority or dissenting views in *Lafayette Park* and *Super K-Mart*, the instant confidentiality rule is unlawfully overbroad.

¹¹ 330 NLRB 287 (1999).

¹² 335 NLRB 1318 (2001).

USA, Inc.¹³ The rule in *Flamingo Hilton-Laughlin*, supra, provided that "[e]mployees will not reveal confidential information regarding our customers, fellow employees, or Hotel Employees." In finding that the rule violated Section 8(a)(1), the Board majority distinguished it from the confidentiality rule found lawful in *Lafayette Park Hotel* on the basis that, unlike that rule, which made no reference to disclosure of information about employees, the rule in *Flamingo* specifically prohibited employees from revealing confidential information about "fellow employees." *Flamingo Hilton-Laughlin*, supra, 330 NLRB at 288 fn. 3. So too did the confidentiality rule in *University Medical Center* (prohibiting "release or disclosure of confidential information concerning patients or employees"), which the Board, relying on *Flamingo Hilton-Laughlin*, found unlawful "because it could reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment, including wages, which they might reasonably perceive to be within the scope of the broadly-stated category of 'confidential-information' about employees." 335 NLRB at 1322. Finally, in *IRIS U.S.A., Inc.*, the disputed confidentiality provision instructed employees that confidential information "about . . . employees is strictly confidential [and] must not be disclosed to anyone. . . ." 336 NLRB at 1015. In finding that the rule violated Section 8(a)(1), the Board relied not only on its similarity to the unlawful rule in *Flamingo Hilton-Laughlin*, but concluded "[m]oreover, the . . . provision [went] further than its counterpart in *Flamingo Hilton-Laughlin* [cite omitted], by additionally instructing employees 'to resolve in favor of confidentiality' '[a]ny

¹³ 336 NLRB 1013 (2001).

doubt about confidentiality' of employee information." 336 NLRB 1013 fn. 1.

We find that the two challenged rules in the instant case go even further than the confidentiality rules found unlawful in *Flamingo*, *University Medical Center*, and *IRIS*. The rules in those cases did not explicitly state that employees were prohibited from discussing their wages and working conditions. Rather, the Board concluded that the rules' broadly stated and undefined proscriptions against discussion of confidential information about employees reasonably could be construed by employees as prohibiting the discussion of wages and working conditions. The instant rule is even more clearly unlawful. The Respondent's confidentiality rule leaves employees with nothing to construe – it specifically defines confidential information to include wages and working conditions such as "disciplinary information, grievance/complaint information, performance evaluations, salary information, salary grade, types of pay increases and termination date of employees," and then explicitly warns employees that "[a]ny breach or violation of this policy will lead to disciplinary action up to and including termination." We conclude, therefore, that this rule, which on its face and on threat of discipline, expressly prohibits the discussion of wages and other terms and conditions of employment, plainly infringes upon Section 7 rights and violates Section 8(1).

3. We reach the same conclusion with respect to the Respondent's communication rule. This rule specifically references the confidentiality rule, discussed above, and prohibits "communicat[ion of] any confidential or sensitive information concerning the Company or any of its employees to any non-employee" without Respondent's approval.

Thus, employees seeking to understand the parameters of this proscription necessarily must consider it in tandem with the fact that confidential information is defined in terms of wages and working conditions. Accordingly, in light of the link between the unlawful confidentiality rule and the communication rule, we conclude that the latter rule also violates Section 8(a)(1).¹⁴

4. In his recommended Order, the judge included broad language requiring the Respondent to cease and desist from "in any other manner" interfering with, restraining, or

¹⁴ Our dissenting colleague would adopt the judge's finding that both rules are lawful because there was no evidence that either was enforced unlawfully and because both rules, rather than being "aimed at Section 7 activity," achieve a reasonable balance between Sec. 7 rights and the need for confidentiality. We disagree on both points.

First, the fact that there is no evidence that either rule was enforced unlawfully is irrelevant where, as here, the alleged violation, is the unlawful maintenance of the rules which, as discussed above, explicitly prohibit employees from exercising their Sec. 7 right to discuss among themselves their wages and other employment terms. *Brunswick Corp.*, 282 NLRB 794, 794-795 (1987). See also *NLRB v. Beverage-Air Co.*, 402 F.2d 411, 419 (4th Cir, 1968) ("mere existence" of an overbroad but unenforced no-solicitation rule is unlawful).

Second, contrary to our dissenting colleague, the rules here do not achieve a balance, reasonable or otherwise, between Sec. 7 rights and the Respondent's confidentiality concerns. As can be seen from the work rule cases discussed above, a balancing analysis assumes the existence of an articulated employer right or concern (e.g., nondisclosure of "hotel private" information in *Lafayette Park*, nondisclosure of "company business" information in *Super K-Mart*, and nondisclosure of "proprietary" information such as business plans and trade secrets in *Mediaone of Greater Florida*), and determines whether it may lawfully coexist with the separate and distinct Sec. 7 rights of employees. Here, there is no employer side of the balancing equation that enables a balancing analysis to be undertaken. By defining its confidentiality concerns in terms of the most basic of Sec. 7 subjects - the ability to discuss terms and conditions of employment with fellow employees - the Respondent's rules violate Sec. 8(a)(1) per se.

coercing employees in the exercise of rights guaranteed them in Section 7 of the Act. The judge provided no supporting rationale for his broad Order and we find that it is not warranted under the test set forth in *Hickmott Foods*, 242 NLRB 1357 (1979). See *Dai-Ichi Hotel Saipan Beach*, 337 NLRB 469, 470-471 fn. 12 (2002); *Kelly Construction of Indiana*, 333 NLRB 1272 fn. 3 (2001). Accordingly, we have provided a new Order and notice which, in addition to conforming with the violations found herein, contains customary narrow language requiring the Respondent to cease and desist from "in any like or related manner" interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Double Eagle Hotel and Casino, Cripple Creek, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining a rule prohibiting employees from discussing tips or the Respondent's tip policy on the casino floor or anywhere on the premises.

(b) Maintaining language in rules in the employee handbook entitled "Confidential Information," "Customer Service," and "Communication" that prohibit employees from discussing with nonemployees or among themselves wages, hours, and other terms and conditions of employment.

(c) Maintaining language in the "Gambling/Use of Property Amenities" rule of the employee handbook that prohibits employees from being on the Respondent's property unless working their scheduled shift.

(d) Maintaining language in the "Communication" rule of the employee handbook that prohibits employees from providing information about the Respondent to the media without the Respondent's prior approval.

(e) Threatening employees, directly or impliedly, with discharge, suspension, arrest, or other reprisals should they engage in union or other concerted activities protected by the Act, including handbilling on the public sidewalk.

(f) Removing union literature from the employees' lunchroom.

(g) Discharging or suspending employees for violating unlawful rules or because they engage in union or other concerted activity protected by the Act.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Rescind the language in the rules indicated in 1(b) through (d) above, remove the language from the employee handbook, and notify employees in writing that this has been done.

(b) Within 14 days from the date of this Order, offer Betty Ingerling, Carol Marthaler, and Barbara McCoy full reinstatement to their former positions, or if their jobs no longer exist, to substantially equivalent

positions, without prejudice to their seniority or any other rights, benefits, or privileges previously enjoyed.

(c) Make Betty Ingerling, Carol Marthaler, and Barbara McCoy whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, less interim earnings, plus interest, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and/or suspensions of Betty Ingerling, Carol Marthaler, and Barbara McCoy and, within 3 days thereafter, notify them in writing that this has been done and that this unlawful action will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, make available to the Board or its agents for examination and copying at a reasonable place designated by them, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Cripple Creek, Colorado facility copies of the attached notice marked "Appendix."¹⁸ Copies of

¹⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since October 1, 2001.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

Dated, Washington, D.C. January 30, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, concurring in part, dissenting in part.

I agree with the judge and my colleagues except as set forth below.

1. I agree with the judge and my colleagues that the Respondent unlawfully maintained and enforced an overbroad oral policy that prohibited its employees from discussing their tips or the Respondent's tip distribution policy anywhere on the Respondent's property. I further agree that the discipline of employees Betty Ingerling, Carol Marthaler, and Barbara McCoy violated Section 8(a)(3). However, consistent with former Member Hurtgen's concurring position in *Saia Motor Freight Line*, 333 NLRB 784, 785-786 (2001), I would not find that all discipline imposed pursuant to an overbroad rule is necessarily unlawful. Thus, where the record clearly establishes that the discipline imposed was for conduct that an employer lawfully can proscribe, and the employer makes clear to the employees that their discipline is for this conduct, I would not find that the discipline violates Section 8(a)(3).

Here, the Respondent had a lawful basis for prohibiting employees from discussing tips on the gaming room floor.¹ However, the Respondent's discipline of its employees was based on their discussion of tips and not on the locus where the discussion occurred. In this regard, Ingerling testified that she was informed only that she was being terminated for discussing tips. Marthaler testified that when Slot Director Rodger Hostetler informed her that

¹ Contrary to the judge, I find that the Respondent, based on "six years of experience" that included "complaints from customers" regarding employee disputes about tips on the game floor, established a legitimate business justification for prohibiting such discussions in this area.

Ingerling had been terminated, Hostetler stated that it was "because of the tip situation . . . and we could not talk about tips anywhere in that building." I recognize that Marthaler additionally testified that, when she and McCoy were suspended, Hostetler made reference to "tips . . . pertaining to Thursday night," i.e., when tips were discussed on the gaming floor. And, later in the discussion, Hostetler referred to "disrupt[ions on] the floor." However, these statements are not sufficient to negate the proposition that the discussions were barred anywhere on company property.

2. I disagree with my colleagues that sections of the Respondent's handbook rules entitled "Confidential Information" and "Communication" are unlawful.

At the outset, it is important to note that the General Counsel does not contend that the rules were used or applied in an unlawful way. Indeed, there is no evidence of any use or application. Rather, the General Counsel contends that these rules are unlawful on their face.

I agree that a rule that clearly proscribes Section 7 activity can be condemned on its face. However, the instant rules are not of that character.

The first rule is not aimed at Section 7 activity. It is aimed at "Confidential Information." Employers have an interest in protecting against the disclosure of such information. In the instant case, disclosure of disciplinary matters, performance evaluations, grievances, pay, and termination data all involve sensitive matters. Disclosure can result in employee friction and invasion of privacy.

The Act seeks to balance Section 7 rights with the need for confidentiality.² The rule here seeks to achieve that balance. It permits discussion of employment-related matters with those inside the employee's department, the area in which most employees are likely to have Section 7 conversations. Further, the rule even permits conversations with those outside the department on a "need to know" basis. Since there is no evidence of use or application, it is not known how this is interpreted and applied. In addition, the rule says that if there are any doubts, an employee need only check with management. There is no indication that any employee has ever checked and received an unlawful answer. In this posture of the case, I would not presume that the rule is unlawful.

Concededly, certain discussions are prohibited within the employees "own group." However, this rule is confined to "personal information" (undefined) and has an exception for "normal needs"(undefined). Again, absent some evidence that this rule has been implemented in an unlawful way, I would not presume that it is illegal.

The handbook's communication rule is also not aimed at Section 7 activity. Rather, it is aimed at "press relations." Arguably, Section 7 includes concerted employee communications to the media about terms and conditions of employment. However, the rule here does not forbid all such communications. It prohibits only the disclosure of "confidential or sensitive information." As discussed above, there is a delicate balance between Section 7 rights and confidentiality concerns. With respect to communications with the media, the concern for confidentiality is particularly

² *Detroit Edison v. NLRB*, 440 U.S. 301 (1979).

heightened. In these circumstances, absent some evidence that the rule has been applied in an unlawful way, i.e. in situations where the Section 7 right would outweigh the confidentiality interest, I would not presume that it is illegal.

3. Finally, I do not pass on the judge's finding that the Respondent violated Section 8(a)(1) because Supervisor Leslie Blevins impliedly threatened employee Tonks with unspecified reprisals if Tina Tonks discussed the Respondent's tip policy. The judge based this finding on Blevins' statement to Tonks that "if you are going to get caught up in this slot mess, I will take care of that problem too." Unlike my colleagues, I find this remark ambiguous. It is not clear whether Blevins was saying that she would take action with respect to the "slot mess" or take action against employees engaged in Section 7 activity. Because of this ambiguity and because finding the statement to be a violation of Section 8(a)(1) it would be cumulative of other 8(a)(1) threats found herein, and would not affect the remedy, I do not pass on this allegation.

Dated, Washington, DC. January 30, 2004

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule prohibiting employees from discussing tips or our tip policy on the casino floor or anywhere on the premises.

WE WILL NOT maintain language in rules of the employee handbook entitled "Confidential Information," "Customer Service," and "Communication" that prohibits you from discussing with nonemployees or among yourselves wages, hours, and other terms and conditions of employment.

WE WILL NOT maintain language in the "Gambling/Use of Property Amenities" rule of the employee

handbook that prohibits you from being on our property unless working your scheduled shift.

WE WILL NOT maintain language in the "Communication" rule of the employee handbook that prohibits you from providing information about us to the media without our prior approval.

WE WILL NOT threaten employees, directly or impliedly, with discharge, suspension, arrest, or other reprisals should they engage in union or other concerted activities protected by the Act, including handbilling on the public sidewalk.

WE WILL NOT remove union literature from the employees' lunchroom.

WE WILL NOT discharge or suspend employees for violating unlawful rules or because they engage in union or other concerted activity protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the language in the rules noted above, remove the language from the employee handbook, and notify employees in writing that this has been done.

WE WILL, within 14 days of the date of the Board's Order, offer Betty Ingerling reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position of employment, without prejudice to her seniority or any other rights she previously enjoyed.

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WE WILL, within 14 days of the Board's Order, rescind the suspensions given to Carol Marthaler and Barbara McCoy.

WE WILL make Betty Ingerling, Carol Marthaler, and Barbara McCoy whole for any loss of earnings and other benefits resulting from our unlawful discrimination against them.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discharge of Betty Ingerling and the unlawful suspensions of Carol Marthaler and Barbara McCoy, and WE WILL, within 3 days thereafter notify them that this has been done and that evidence of this unlawful conduct will not be used against them in anyway.

National Labor Relations Board
Division of Judges
DOUBLE EAGLE HOTEL & CASINO
AND
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL NO. 113
Cases 27-CA-17816-2
27-CA-8048-1
JD(SF)-12-03
Colorado Springs, CO
March 3, 2003

William J. Daly and Renee C. Barker, Esqs., of Denver,
Colorado, for the General Counsel.

Henry L. Solano, Esq., of Denver, Colorado, for the Re-
spondent.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me at Colorado Springs, Colorado, on November 13 and 14, 2002, upon the General Counsel's complaint which alleged that the Respondent committed certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, including the discharge of one employee and the suspension of three others.

The Respondent generally denied that it committed any violations of the Act, alleged ten general affirmative defenses, including that the discharge and suspensions were for cause.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended order:

I. JURISDICTION

The Respondent is a corporation engaged at Cripple Creek, Colorado, in the operation of a hotel and casino. In the course and conduct of its business, the Respondent annually purchases and receives at its Cripple Creek facility goods, products and materials directly from points outside the State of Colorado, valued in excess of \$5,000 and annually derives gross revenues in excess of \$500,000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers (herein the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts.

Principally involved in this matter are two of several categories of employees – slot employees (technicians and attendants) and security officers. Both deal with customers who play slot machines, the basic difference being that the slot technicians are also capable of doing repair work on the machines and security officers apparently have additional responsibilities relating to security. Both

receive tips from customers in addition to their hourly wage. The security officers wear black polo shirts and the slot employees wear colored ones.

Prior to May 21, 2001,¹ the Respondent's tip policy was such that each employee was required to put any tips received into a common pot and at the end of the shift, the tips would be divided in two, with each slot employee receiving an equal portion of one-half and each security officer an equal portion of the other. Necessarily, if there were more slots on duty than security, then the amount received by each slot would be less than the amount received by each security employee. And this is precisely what occurred on a few occasions in early 2001 when there were more slot employees on duty than security officers. As a result, the slot employees were unhappy.

Thus, by memo of May 21 from Gilbert Sisneros, the Respondent's General Manager/Owner, this policy was changed. Thereafter, the tip pool would be divided equally among all slot and security employees who worked the particular shift. However, this change in policy caused concern among some slot employees, at least those working the swing shift from 4 p.m. to 2 a.m., because typically there were fewer slots on duty than security (as opposed to the situation in early 2001 which prompted the change). The tip policy was a source of discussion among them.

That employees discussed the tip policy among themselves on the casino floor, and other places on the property, and were told not to do so is the genesis of this dispute. At issue are numerous allegations of the Respondent

¹ All dates are in 2001, unless otherwise indicated.

promulgating oral and written rules forbidding employees from discussing work-related issues among themselves and on company property, threats for not complying with these rules, the discharge of one employee and the suspension of three others for breaching these rules and engaging in other concerted activity protected by the Act. The facts and analysis of each allegation, or of several allegations where they involve generally the same unlawful activity, will be treated seriatim as they appear in the complaint.

B. Analysis and Concluding Findings.

1. The No-discussion rules.

The Respondent admits that it has maintained a rule prohibiting employees from discussing the tip policy on the casino floor. And the Respondent concedes that as a general proposition, the Board finds unlawful rules which restrict employees from discussing earnings. *E.g.*, *Fredericksburg Glass and Mirror, Inc.* 323 NLRB 165 (1997), though rules applicable to an industrial setting do not transfer to retail enterprises. Indeed, the Board has long held that rules relating to employee activity on the sales floor of a retail establishment may be more restrictive than those applicable to an industrial enterprise. *E.g.*, *Marshall Field & Co.*, 98 NLRB 88 (1952).

No doubt a casino is similar to a retail store, see *M&R Investments, Inc., d/b/a Dunes Hotel and Country Club*, 284 NLRB 871 (1987), and, as with retail stores, to insure good order a discipline on the sales floor and employer can restrict solicitation in the selling areas. *McBride's of Naylor Road*, 229 NLRB 795 (1977). However, there is a distinction between "talking" and "solicitation." *W. W. Grainger, Inc.*, 229 NLRB 161, 166 (1977). And to prohibit

employees from discussing matters pertaining to unionization while on duty, but allowing discussion of other matters, violates Section 8(a)(1). *Teledyne Advanced Materials*, 332 NLRB No. 53 (2000). Here there were no restrictions on subjects employees could discuss, other than attending to the needs of customers. Undeniably, when not busy, employees discussed among themselves a wide variety subjects.

The Respondent argues that the no discussion policy in regard to tips was restricted to the gaming floor and was necessary because employee discussion of tips could lead to arguments among employees and make the customers' gaming experience an unpleasant one. Therefore, the proscription has a valid business justification and is not unlawful. I reject this argument.

First, as promulgated, the no discussion rule was not limited to the gaming floor but was general – anytime, anywhere on company property. Such is clearly too restrictive and therefore unlawful. Second, even if the rule was simply limited to the gaming floor, the Respondent has shown no substantial business justification for it. While the Respondent's argument has some appeal in the abstract, there is no evidence that employees in fact discussed the tip policy in such a manner as to upset customers or even did so within hearing of customers. Speculation is no substitute for evidence. Absent some proven basis for prohibiting employees from talking about tips, I conclude that the rule was violative of Section 8(a)(1), as alleged in paragraph 5(a).

The General Counsel also alleges that rules set forth in the "Employee Handbook" unlawfully restrict employee communication among themselves. Specifically, the General

Counsel argues that employees are prohibited from discussing certain subjects under "Confidential Information." However, the rule as written does not amount to an absolute proscription on discussing these subjects. Thus, "Information should be provided to employees outside the department or to those outside the Company only when a valid need to know can be shown to exist." And, "Unless there is a need for it in the normal course of business, personal information concerning individual employees should not be discussed with members of your own group."

Since discussion among employees of terms and conditions of employment is clearly a valid need in the normal course of their employment, the prohibition set forth would not be applicable. Nor does the rule specifically deny employees this right. Thus, I cannot find it unlawful on its face, nor is there evidence that it was enforced in a fashion more restrictive than written. Accordingly, I shall recommend that paragraph 5(b) be dismissed. *Lafayette Park Hotel*, 326 NLRB 824 (1998).

The General Counsel similarly alleges that the "Customer Service" section in the handbook unlawfully restricts employees from discussing working conditions. Specifically: "Never discuss Company issues, other employees, and personal problems to or around our guests. Be aware that having a conversation in public areas with another employee will in all probability be overheard." I find nothing in this rule which unlawfully prohibits employees from discussing working conditions among themselves on the casino floor. Accordingly, I shall recommend that paragraph 5(c) be dismissed.

In paragraph 5(c) the General Counsel alleges that on October 26, Slot Director Rodger Hostetler "orally

promulgated a rule prohibiting employees from discussing tips or company problems." The only evidence which might tend to support this allegation is in the testimony of Betty Ingerling concerning her discharge interview wherein Hostetler told her she was being discharged for the "tip policy and that I was, and that's [what] I get for being a spokesperson for the other employees." I find nothing in Ingerling's testimony which would support a finding that Hostetler promulgated an unlawful rule, though this testimony does tend to show that Ingerling was unlawfully discharged, as will be discussed below. I shall recommend that paragraph 5(o) be dismissed.

Finally, the General Counsel alleges that on March 23, 2002, Security Lead Chuck Robertson "promulgated a rule prohibiting an employee from talking to another employee about any subject." The Respondent denies he did so and in any event, he is not a supervisor or agent whose actions would bind it.

During the material time, Robertson was the Security Lead on the swing shift, which meant that he was the highest ranking security employee. He was paid \$1.00 more than the average of other security employees and his duties included, according to Director of Human Resources Arthur Gomez, offering technical direction to:

Any security officer that may have a question pertaining to compliance issues with gaming regulations, Mr. Robertson would be expected to know the answers and provide guidance on that. He would also be the individual that a security officer may report to if that officer needed to leave the zone that they were working in for restroom breaks or whatever the case may be. They would report that to Mr. Robertson and he

would either cover that section himself or find someone else to do it for them.

While Gomez testified that Robertson had no direct disciplinary authority, he was listened to and did sign corrective action notices. Indeed, he was the person who was directly involved in telling Tina Tonks not to talk to another employee (see *infra*) and it was he who suspended. The issue is whether Robertson was a mere conduit for disciplinary and other supervisory decisions, as contended by the Respondent. *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998). Or whether he exercised independent judgment. As to Tonks, and generally directly security personal on his shift, I believe Robertson exercised independent judgment.

From these facts, I conclude that Robertson in fact responsibly directed employees, assigned them to specific zones when needed, and was responsibly involved in the discipline of employees. As such he was a supervisor within the meaning of Section 2(11) of the Act and his statements bound the Respondent.

I discount the Respondent's argument that since he accepted tips, and Colorado gaming laws prohibit "key employees" from doing so, he must not have been a supervisor. I conclude there is a distinction between a "key employee" and lower level employees who nevertheless have supervisory authority under Section 2(11). As argued by the Respondent a "key employee" "is any executive, employee, or agent of the gaming licensee having the power to exercise a significant influence over decisions concerning any part of the operation of the gaming licensee. C.R.S. § 12-47.1-103(14)." Such definition clearly refers to higher management and not to line supervisors.

In support of the allegation in paragraph 5(z), the General Counsel argues that on March 23, 2002: "By forbidding Tonks to speak to Sherry (an employee in another classification) at any time on any subject, Robertson was attempting to solve the problem of a love triangle, but he restricted Tonks from discussing protected subjects, such as terms and conditions of employment." This, I conclude, is a stretch. Tonks testified that Robertson told her that night not to talk to Sherry, because of a perceived love triangle problem. (According to Robertson, Sherry and another woman were dating the same man.) It is difficult to conclude that Tonks and other employees would therefore believe that they were unlawfully forbidden to discuss terms and conditions of employment. No doubt companies have the management right to keep personal problems among employees in check. Regardless of whether Robertson's proscription to Tonks was reasonable, I do not find it to have interfered with the exercise of Section 7 rights. Accordingly, I will recommend that paragraph 5(z) be dismissed.

2. The No Access Policy.

Unquestionably, the Respondent has a rule prohibiting employees from being on company property during their off-duty hours. Specifically, in the Employee Handbook: "You are not allowed on property unless working. (With permission, employees can, apparently, take meals in the restaurant). You are not allowed to gamble on property at any time." The General Counsel contends this rule infringes on employees' Section 7 rights because on its face it denies to employees access even to parking lots and other nonworking areas. The Respondent maintains that such a construction is "hyper technical" and that "on

property' means the interior of the facility." Thus Arthur Gomez, the Respondent's Director of Human Resources, testified that "on property" in the written rules means "the buildings, the gaming area, the hotel." He distinguished between "on property" and "on premises" which would include outside areas such as the parking lots. But he further testified, that this distinction was "In my mind." It is not set forth in any written document offered by the Respondent.

I reject the Respondent's argument. The rule says what it says. If the Respondent had wanted to exclude parking lots and other no-work areas from its no-access rule, it could have done so. However, as written, the rule infringes on employees' Section 7 rights and therefore violates Section 8(a)(1) as alleged in paragraph 5(d). *Lafayette Park Hotel*, supra.

3. Proscription Against Talking to the Media and Others.

In material part, the "Communication" section of the Employee Handbook states: "Without appropriate approval, under no circumstances shall you provide information about the company to the media." "You are not, under any circumstances, permitted to communicate any confidential or sensitive information concerning the Company or any of its employees to any non-employee without approval from the General Manager or the President."

With caveats not applicable here, the Board has generally concluded that rules barring employees from discussing matters relating to their terms and conditions of employment with news organizations as well as other third parties is unlawful. *E.g., Leather Center, Inc.*, 312

NLRB 521 (1993). I therefore conclude that the blanket prohibition from providing any information about the company to the media is an unlawful infringement on Section 7 rights and violates Section 8(a)(1) as alleged in paragraphs 5(e) and (f).

However, whether the proscription in the second sentence violates the Act is another matter. I conclude not. In *Lafayette Park Hotel*, supra, the Board formed a similar rule permissible, concluding that employees reading the rule would not reasonably conclude that they were prohibited from discussing their wages and other terms and conditions of employment among themselves and with others. And the employer did have a legitimate interest in protecting confidential information. Accordingly, I conclude that paragraph 5(g) should be dismissed.

4. Alleged Threats.

In paragraphs 5(h), (j), (k), (l), (m), (n), (p), (t), (w), (x), (y), and others which were withdrawn at the hearing, the General Counsel alleges that various agents of the Respondent threatened employees in violation of Section 8(a)(1).

On a Saturday night in late October, Lead Key Leslie Blevins asked an employee in security, Lisa Henderson, to serve as a cocktail waitress. Some employees observed Henderson keeping tips she received rather than putting them in the common tip box, and they so informed Betty Ingerling who said she would take this up with management. And she did tell Hostelter what she had heard. Then the next day, according to Ingerling, Blevins called Ingerling into her office and "wanted to know what the big deal was" with regard to Henderson and the tips. Ingerling told

her what she had heard and Blevins said, "well it was only a few dollars and she (Blevins) was the one that had asked her to cocktail." Blevins went on to say "that maybe I would be happier working someplace else." Ingerling further testified that Blevins "said that if the three of, any of us would have went up to Gilbert's (Sisnero) office, we would have, he would have automatically fired us on the spot. . . ."

That Ingerling and others questioned the Respondent allowing Henderson to keep the cocktail tips she received was clearly concerted activity protected by the Act, even if their concern was trivial. However, to find a violation alleged in paragraph 5(h) would require crediting Ingerling over Blevins denials, which I decline to do.

I conclude that Ingerling's testimony was of questionable credibility, and where in direct conflict with others, I do not credit her. In October, as the issues involved in this matter were active, including the tip matter, and a few days prior to her discharge, Ingerling and three other slot employees wore black (security) polo shirts rather than their green ones. Ingerling adamantly claimed that doing so was not a concerted protest. She testified that she wore the black shirt out of modesty concerns and the fact that other slot employees also wore black was a mere coincidence. After months of wearing the green shirt, "I found the green shirts were not very becoming to women." "They were very thin." But one of men, who apparently had no similar concerns, told Robertson "as long as we're going to have to split the tips with the security the way we are, we're just going to come dressed like security." Ingerling's testimony about wearing the black shirt is simply so incredible that I believe that she sought to mislead me on what she thought was a material issue. Accordingly, I

discredit her and conclude that the Respondent did not violate Section 8(a)(1) as alleged in paragraph 5(h).

It is alleged in paragraph 5(j) that Hostetler and Blevins told an employee that the reason for the employee's discharge was because that employee was an instigator and spokesperson for other employees, thereby impliedly threatening employees. This apparently relates to Ingerling's discharge interview at which only she was present. If credited, which I do not, it would be some evidence that her discharge was for the unlawful reason that she had engaged in protected, concerted activity. However, even then it is questionable that this would be independently violative of Section 8(a)(1) since there is no evidence it was communicated to other employees. In any event, I do not credit Ingerling and conclude that paragraph 5(j) should be dismissed.

In paragraph 5(k) it is alleged that on or about October 26, Hostetler "impliedly threatened an employee by telling the employee to cease engaging in protected concerted activities of attempting to obtain changes in the Respondent's tip policy." This allegation is apparently based on the testimony of Ingerling who had discussed with Hostetler arranging a meeting between her and management on behalf of several employees. I cannot find in her testimony that Hostetler made the implied threat alleged. Accordingly, I shall recommend that this paragraph be dismissed.

The alleged implied threat in paragraph 5(l) (discharge if employees attempt to change the tip policy) seems subsumed in the allegation prohibiting discussion of the tip policy in paragraph 5(a). There is no independent evidence of such a threat. Nevertheless, that the

Respondent prohibited employees from discussing the tip policy, as found above, implies some kind of discipline if employees violate the prohibition. Accordingly, I conclude that the Respondent did impliedly threaten employees should they attempt to change the tip policy.

Paragraph 5(m) alleges that Robertson threatened employees should they discuss the discharge of Ingerling. Tonks testified that about 45 minutes after Ingerling was discharged, Robertson "said I just want to let you know that anyone caught talking about the situation with Betty will be suspended or fired." Robertson testified that he was working just three days a week and was not present the day Ingerling was terminated. He further testified that he did not discuss the fact of Ingerling's discharge with "the security staff on duty" or any of the slot staff.

Although Robertson seemed credible, and has no apparent stake in the outcome of this matter since he is no longer employed by the Respondent, he was not asked to specifically deny the assertion of Tonks. His testimony, while seemingly in direct conflict with Tonks', really was not. He was simply asked in general terms whether he discussed Ingerling's discharge with any of the security staff on duty. Such, I conclude, is not sufficient to rebut the testimony of Tonks, whom I found also to be a generally credible witness. Accordingly, I conclude that Robertson made the threat alleged in paragraph 5(m).

Don Herndon is the Director of Security. On October 29, he suspended Carol Marthaler and Barbara McCoy (discussed below) and at that time, according to Marthaler, "he told us that if we came, when we came back, we were not to say one word to anybody about our suspension, because if we did we would be fired, and it was going to be

kept confidential and nobody was to know." Herndon testified to the events leading to the suspension of Marthaler and McCoy, however, he was not asked to affirm or deny the statement attributed to him by Marthaler. I therefore conclude that he did in fact tell them not to discuss their suspensions and if they did, they would be discharged. An employee's suspension is clearly a term or condition of employment which employees have the protected right to discuss. Thus Herndon's admonition was clearly a threat in violation of Section 8(a)(1) as alleged in paragraph 5(n).

In paragraph 5(p) it is alleged that Hostetler "threatened employees with discharge if they violated the rule described above in paragraph 5(o)." Inasmuch as I concluded above that Hostetler did not promulgate the rule alleged in paragraph 5(o), nor I have I been directed to testimony in support of the alleged threat, I conclude that the allegation in paragraph 5(p) has not been established by a preponderance of the credible evidence and should be dismissed.

It appears that the threat alleged in paragraph 5(t) is based on the testimony of Tonks. She recalled an incident occurring a few days before Christmas wherein Robertson called her into to Blevins office. "Well Leslie (Blevins) said that she had a problem, that I was snubbing, and I said no, I'm not snubbing you, and she said well, if you are going to get caught up in this slot mess, I can take care of that too. And I said no, ma'am I'm not. And she just reiterated, I suppose, if you are going to get caught up in this slot mess, I will take care of that problem too." Blevins was not asked to affirm or deny the testimony of Tonks. Thus I find that Blevins made the statement attributed to her by Tonks. Since this occurred following

the discharge of Ingerling and much discussion of the tip policy change, I conclude that Blevins did make an implied threat of reprisals to Tonks should she discuss the tip policy. Accordingly, I conclude that the allegation in paragraph 5(t) has been established.

For four nights beginning on January 11, 2002, union representative Leslie Thompson, Ingerling and three members of the Union passed out handbills at the Respondent's premises. Two of the handbillers were stationed in the public alley and two on the public sidewalk in front of the casino. According to Thompson, whose testimony I credit, after they had been handbilling a short time, Herndon "stuck his head out front and said he was calling the cops and so I stepped there to talk to him." Thompson denied that the handbillers had blocked access to the casino, had been in the alcove or had stood anywhere other than the public sidewalk. Nevertheless, Herndon "said well I'm calling the cops and you can be arrested for criminal trespass." In fact the police came and said "it would probably be best if we spent the rest of - that there wasn't a problem with us being on the other side, but it was probably best if we spent the rest of the night on the far side of the street." They were not given a citation by the police and returned to handbill the next three evenings.

The Respondent contends that Herndon saw the handbillers block the entrance door and told them they could not. He further testified that they did not seem agreeable and he therefore called the police. Ingerling and Thompson deny that they blocked entrance to the casino or were stationed anywhere other than the sidewalk. On this I credit Ingerling and Thompson and I discredit Herndon. I conclude that Herndon called the police to have

the handbillers removed from in front of the casino, but which was public property. The police would not do so and the handbilling continued another three days without incident. The threat to have the police remove them from the public sidewalk, followed by attempting to do so was violative of Section 8(a)(1) as alleged in paragraph 5(w) of the complaint. *Snyder's of Hanover, Inc.*, 334 NLRB No. 21 (2001).

Shelly Ridderman, a bartender, testified that she observed union representatives passing out literature at the front entrance to the casino two days. The first day, according to Ridderman, her supervisor Sarah Tonn "told me she just wanted to warn me that if anybody was caught talking about the Union or handing out pamphlets or reading them or anything, they would be fired."

Tonn generally denied making such a statement to Ridderman, but did admit having a discussion with her about the handbilling. On this I credit Ridderman and discredit Tonn. I found Ridderman's version more believable and consistent with the Respondent's actions toward the employees' union activity. Accordingly, I conclude that the Respondent made the threat alleged in paragraph 5(x).

Tonks testified that "maybe in February" "Chuck and Denny, Chuck Robertson and Denny Warrick were walking by the cage, and as they rounded the cage, Denny said this union thing is getting out of hand, and that was all I heard." This is alleged in paragraph 5(y) to have been an unlawful threat. I disagree. First, whatever Warrick said, according to Tonks, it was not addressed to her or any other employee. She simply overheard the remark. Secondly, I do not believe this brief comment contained any

kind of an implied threat of reprisals. Accordingly, I conclude that paragraph 5(y) should be dismissed.

5. The Removal of Union Literature.

It is alleged that on December 3, Dennis Warrick and Leslie Blevins removed union literature from the Respondent's lunchroom in violation of Section 8(a)(1). The parties are in general agreement concerning the facts of this allegation. On December 8, Lowell Moses was terminated (apparently for cause and his termination is not in issue here). When Moses was being escorted from the premises, he placed an item of union literature on Hostetler's desk. Warrick then learned that there were items of union literature in the employees' lunchroom. He retrieved these and Blevins gave them to Sisneros who in turn, sent them to his attorney.

The General Counsel argues that removing this literature was violative of Section 8(a)(1) because doing so tended to interfere with employees' right to distribute union literature in non-work areas on non-working time. I agree. *Venture Industries, Inc.*, NLRB No. 159 (2000).

The Respondent contends that the union literature related to the discharge of Moses for threatening another employee, was therefore evidence and cannot be considered covered by Section 7. Essentially the Respondent argues that if an employee is discharged for cause, any protected activity he might have engaged in loses its protection as to other employees. I find no basis in the Act to support this assertion, nor has the Respondent cited any supporting authority or even offered facts (as opposed to argument) that the literature placed by Moses in fact related to the threats he made leading to his discharge.

Accordingly, I conclude that by removing union literature from the employees' lunchroom, the Respondent violated Section 8(a)(1) as alleged in paragraph 5(q).

6. The Discharge of Betty Ingerling.

On October 26, Ingerling was discharged allegedly because she requested a meeting with the Respondent's general manager to discuss wages, hours and other terms and conditions of employment and/or because she violated the Respondent's rule prohibiting discussion of the tip policy on the casino floor. Although there is conflicting testimony concerning Ingerling's participation in concerted activity, and whether such had a causal relationship to her discharge, no doubt a motivating reason was the fact that she had discussed the tip policy on the casino floor.

Thus Blevins testified, in answer to the reasons Ingerling was discharged, "Betty had several situations that she was involved in and discussing tips on the floor was one." Blevins further testified that McCoy and Marthaler were suspended rather than discharged because "we hadn't called them in on a tip issue."

There is no doubt from Respondent's admissions that absent Ingerling discussing the tip policy on the casino floor she would not have been discharged. My conclusion that Ingerling was unlawfully discharged is based on these admissions and not on Ingerling's credibility, which I find singularly lacking.

Since I have concluded that the rule violation for which Ingerling was discharged was unlawful, it follows that her discharge was also unlawful as alleged in paragraph 6(c) of the complaint.

7. The Suspensions of Carol Marthaler and Barbara McCoy.

The Respondent admits that Marthaler and McCoy were discharged because they talked on the gaming floor about the Lisa Henderson tip decision which was a violation of the Respondent's rule prohibiting such discussions. Prohibiting the discussion of tips generally, and the Henderson situation specifically, clearly violates Section 8(a)(1), absent some evidence that such was necessary to maintain good order and discipline and avoid negative customer reaction. As noted above, I conclude that the Respondent did not offer sufficient persuasive evidence that prohibiting employees from discussing tips on the gaming floor was justified. Nor did the Respondent offer evidence that the specific discussion of the Henderson tip situation was justified.

Clearly, the Respondent's decision relating to Henderson being allowed to keep her tips rather than share them affected the wages of other employees, even if minimally. To have prohibited employees from talking about this on the gaming floor was clearly violative of Section 8(a)(1). The suspension of Marthaler and McCoy for breaching this proscription was necessarily also violative of Section 8(a)(1).

8. The Suspension of Tina Tonks.

The General Counsel alleges that Tonks was unlawfully suspended for violating the unlawful rule prohibiting discussion of tips [paragraph 5(a)] "and/or the rule described above in paragraph 5(x) and to discourage

employees from engaging in these or other concerted activities.”²

The General Counsel argues that Tonks was suspended when she breached a rule promulgated by Herndon to the effect that she was not to talk to fellow employee Sherry because of a “love triangle” at work.

As the General Counsel argues, and as the evidence shows, the basis of Herndon’s proscription to Tonks did not relate to wages, hours or other terms and conditions of employment. Without regard to the reasonableness, or lack thereof, of Herndon’s attempt to head off a situation involving employees’ personal problems, such did not relate to concerted activity protected by the Act. In short, I conclude that Tonks was not suspended for violating the unlawful rule concerning discussion of tips. Accordingly, I conclude that the General Counsel failed to prove that Tonks was suspended in violation of Section 8(a)(1) of the act and I shall recommend paragraph 5(x) be dismissed.

IV. REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it should be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act, including offering reinstatement to Betty Ingerling³ to her former job, or if that job no longer exists, to a substantially equivalent position of employment and make her

² As noted above, paragraph 5(x) alleged a threat by Tonn, not an unlawful rule.

³ Notwithstanding that I generally did not credit Ingerling, she should be reinstated with back pay in order to vindicate public rights.

and Carol Marthaler and Barbara McCoy whole for any loss of earnings and other benefits they may have suffered in accordance with the provisions *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Double Eagle Hotel & Casino, its officers, agents, successors and assigns shall:

1. Cease and desist from:
 - a. Maintaining a rule prohibiting employees from discussing tips or the Respondent's tip policy on the casino floor.
 - b. Maintaining a rule prohibiting employees from discussing with non-employees or among themselves wages, hours and other terms and conditions of employment.
 - c. Maintaining a rule prohibiting employees from being on its property unless working their scheduled shift.
 - d. Maintaining a rule prohibiting employees from providing information about the Respondent to the media without the Respondent's prior approval.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

e. Threatening employees, directly or impliedly, with discharge, suspension, arrest or other reprisals should they engage in union or other concerted activities protected by the Act, including handbilling on the public sidewalk.

f. Removing union literature from the employees' lunchroom.

g. Discharging or suspending employees for violating unlawful rules or because they engage in union or other concerted activity protected by the Act.

h. In any other manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

a. Offer Betty Ingerling, Carol Marthaler and Barbara McCoy reinstatement and back pay in accordance with the Remedy Section above and rescind the discharge and suspensions given them and notify them this has been done and the disciplines will not be used against them in any way.

b. Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this Order.

c. Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms

⁵ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read

(Continued on following page)

provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all former employees employed by the Respondent at any closed facility since the date of this Order.

d. Within 21 days after service of this Order, inform the Region, in writing, what steps the Respondent has taken to comply therewith.

e. The allegations of unfair labor practices not found above are dismissed.

Dated, San Francisco, California, March 3, 2003.

/s/ _____
James L. Rose
Administrative Law Judge

"POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES
COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of
their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected
concerted activities.

WE WILL NOT maintain a rule prohibiting employees
from discussing tips or our tip policy on the casino floor.

WE WILL NOT maintain a rule prohibiting employees
from discussing with non-employees or among themselves
wages, hours and other terms and conditions of employ-
ment.

WE WILL NOT maintain a rule prohibiting employees
from being on our property unless working their scheduled
shift.

WE WILL NOT maintain a rule prohibiting employees
from providing information about us to the media without
our prior approval.

WE WILL NOT threaten employees, directly or
impliedly, with discharge, suspension, arrest or other
reprisals should they engage in union or other concerted

activities protected by the Act, including handbilling on the public sidewalk.

WE WILL NOT remove union literature from the employees' lunchroom.

WE WILL NOT discharge or suspend employees for violating unlawful rules or because they engage in union or other concerted activity protected by the Act.

WE WILL NOT in any other manner, interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Betty Ingerling reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position of employment and make whole for any loss of wages or other benefits they may have suffered.

WE WILL rescind the suspensions given to Carol Marthaler and Barbara McCoy and will not use such suspension in any way against them and we will make them whole for any loss of wages they may have suffered as a result of the suspensions.

DOUBLE EAGLE HOTEL
& CASINO

(Employer)

Dated _____

By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National

Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

600 17th St.-7th Floor, North Tower
Denver, CO 80202-5433

**THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE**

**THIS NOTICE MUST REMAIN POSTED FOR 60
CONSECUTIVE DAYS FROM THE DATE OF POSTING
AND MUST NOT BE ALTERED, DEFACED, OR COV-
ERED BY ANY OTHER MATERIAL ANY QUESTIONS
CONCERNING THIS NOTICE OR COMPLIANCE WITH
ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE
REGIONAL OFFICE'S COMPLIANCE OFFICER 303-
844-3554.**



DEC 27 2013

No. 05-477

In the Supreme Court of the United States

DOUBLE EAGLE HOTEL & CASINO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that petitioner committed unfair labor practices by disciplining employees for violating an unlawful work rule that prohibited employee discussion of petitioner's tips-splitting policy anywhere on its property.

2. Whether the Board reasonably concluded that petitioner unlawfully maintained a "Confidential Information" rule that specifically defined confidential information to include wages and other terms and conditions of employment, and warned that breach of the non-disclosure policy would lead to discipline.



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In the Supreme Court of the United States

No. 05-477

DOUBLE EAGLE HOTEL & CASINO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 414 F.3d 1249. The decision and order of the National Labor Relations Board (Pet. App. 22-44) and the decision of the administrative law judge (Pet. App. 45-71) are reported at 341 N.L.R.B. No. 17.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2005. The petition for a writ of certiorari was filed on October 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. 157, guarantees the right of employees "to self-organization, to form, join, or assist labor organizations, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Those Section 7 "organization rights are not viable in a vacuum; their effectiveness depends * * * on the ability of employees to learn the advantages and disadvantages of organization from others." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). Therefore, Section 7 encompasses the rights of employees to solicit and communicate with other employees regarding wages and other terms and conditions of employment. See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978). Employers violate Section 8(a)(1) of the NLRA if they "interfere with, restrain, or coerce employees in the exercise of [those] rights." 29 U.S.C. 158(a)(1).

To strike an appropriate balance between employees' Section 7 rights and an employer's legitimate interest in maintaining discipline and production (see *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.8 (1945)), the National Labor Relations Board has articulated special standards in certain industries for assessing the legality of rules restricting employee discussion at the workplace. For casinos, the Board applies the same standards it developed for retail stores. *Dunes Hotel*, 284 N.L.R.B. 871, 875 (1987) ("the gambling area" of a casino "equates to [the] 'selling floor' areas") (quoting *Barney's Club*, 227 N.L.R.B. 414, 416 (1976)); see *Montgomery Ward & Co. v. NLRB*, 692 F.2d 1115, 1121 (7th Cir. 1982) (describing retail store rules), cert. denied, 461

U.S. 914 (1983). Under those standards, an employer can issue a rule banning employee discussion of wages and other terms and conditions on the casino gambling floor and its adjacent aisles and corridors. *Hughes Props., Inc. v. NLRB*, 758 F.2d 1320, 1322-1323 (9th Cir. 1985). An employee no-discussion rule that extends to other public areas is overbroad and violates Section 8(a)(1), absent a demonstrated particular and legitimate employer interest. *Ibid.*; see *Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 108-109 (D.C. Cir. 2003).

Additionally, employer rules of conduct governing employee behavior violate Section 8(a)(1) when the rule "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), enforced, 203 F.3d 52 (D.C. Cir. 1999) (Table). See *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67 (2d Cir. 1992) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. at 803 n.10).

2. Petitioner operates a hotel and casino in Cripple Creek, Colorado. Pet. App. 2. Its casino workers include slot and security employees who work on the casino gambling floor and receive tips from customers. *Ibid.* Petitioner maintains an unwritten policy that dictates how tips are to be divided between slot and security employees. *Id.* at 2-3. In May 2001, Petitioner changed the tips policy. Petitioner also established an unwritten tips rule that prohibited employees from discussing tips anywhere on petitioner's property. *Id.* at 3. In late October, shortly after a union organizing campaign began among petitioner's employees, petitioner discharged employee Betty Ingerling and suspended

employees Carol Marthaler and Barbara McCoy for violating its tips discussion rule. *Id.* at 14-15.¹

Petitioner's employee handbook includes rules concerning customer service and confidential information. Pet. App. 5, 18. The customer-service rule instructs employees "[n]ever [to] discuss Company issues, other employees, and personal problems to or around our guests," and to "[b]e aware that having a conversation in public areas with another employee will in all probability be overheard." *Id.* at 5. Petitioner's confidential-information rule states:

Pursuant to Company policy . . . you may be required to deal with many types of information that are extremely confidential and with the utmost discretion must be observed. It is essential that no information of this kind is allowed to leave the department, other than by activity/job requirement, either by documents or verbally. A list, which is not all-inclusive, of the types of information considered confidential is shown below:

- disciplinary information
- grievance/complaint information
- performance evaluations
- salary information
- salary grade
- types of pay increases
- amounts of pay increases

¹ Before the Board and the court of appeals, petitioner claimed that its rule only prohibited discussion of tips on the casino floor. The court, on substantial evidence grounds, upheld the Board's finding that the rule instead prohibited discussion *anywhere* on petitioner's property. Petitioner does not challenge that finding. Pet. 17 n.3.

- termination data for employees who have left the company

Information should be provided to employees outside the department or to those outside the Company only when a valid need to know can be shown to exist.

* * * * *

Any breach or violation of this policy will lead to disciplinary action up to and including termination.

Id. at 18-19, 28.

3. The Board's General Counsel issued a complaint alleging that petitioner violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by maintaining several unlawful work rules. The complaint also alleged that petitioner violated Section 8(a)(3) and (1), 29 U.S.C. 158(a)(3) and (1),² by disciplining employees for breaking its unlawfully overbroad rule that prohibited employees from discussing tips anywhere on its property. Pet. App. 45.

The Board issued a decision finding, *inter alia*, that petitioner's maintenance of its rules on customer service, confidential information, and discussion of tips violated Section 8(a)(1) of the NLRA, and that petitioner's discipline of employees under the invalid tips rule violated Section 8(a)(3) and (1) of the NLRA. Pet. App. 22-

² Section 8(a)(3) of the NLRA makes it unlawful for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." A Section 8(a)(1) violation is "derivative" of a violation of Section 8(a)(3). *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

41.³ The Board explained that petitioner could lawfully maintain a rule prohibiting employees from soliciting each other and discussing their working conditions in the casino's gambling areas and in adjacent aisles and corridors frequented by customers. But the Board found the customer-service rule unlawful because it extended to discussions in public places outside the gambling area, such as restrooms, public restaurants, sidewalks, and parking lots. *Id.* at 26-27. The Board similarly concluded that petitioner's rule "proscribing the discussion of tips and its tip policy anywhere on [its] property, is overly broad and unlawful." *Id.* at 24 n.6.

The Board held that petitioner's rule on confidential information was unlawful because, "on its face and on threat of discipline, [it] expressly prohibits the discussion of wages and other terms and conditions of employment." Pet. App. 32 (applying the test of *Lafayette Park Hotel*, 326 N.L.R.B. at 825). As the Board explained, the rule "specifically defines confidential information to include wages and working conditions such as 'disciplinary information, grievance/complaint information, performance evaluations, salary information, salary grade, types of pay increases and termination date of employees,' and then explicitly warns employees that '[a]ny

³ Petitioner does not challenge certain other Section 8(a)(1) violations found by the Board, including that petitioner: maintained language in its employee handbook that prohibited employees from being on its property unless working their scheduled shift and from providing any information about petitioner to the media without prior approval; threatened to call, and called, the police to remove union supporters engaged in handbilling from public property adjacent to the casino; threatened employees with reprisals if they discussed their suspensions with other employees or talked with union representatives or distributed or read union literature; and removed union literature from the employee lunchroom. Pet. App. 3-4 & n.1, 22 n.1, 58-63.

breach or violation of this policy will lead to disciplinary action up to and including termination.'" *Ibid.*

Finally, the Board concluded that petitioner's discipline of employees for discussing the tips policy was itself unlawful because it was based on the invalid tips rule. Pet. App. 23-24 n.3. The Board explained that, "where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule." *Ibid.* (relying on *Opryland Hotel*, 323 N.L.R.B. 723, 728 (1997)).

Concurring in part and dissenting in part, Chairman Battista stated that, in his view, when the record clearly establishes that the discipline imposed was for conduct that an employer lawfully can proscribe, and the employer makes clear to the employees that their discipline is for that conduct, he would not find the discipline unlawful. Pet. App. 38.⁴ On the record in this case, however, he concluded that it was not clear that the employees were disciplined for discussions that occurred on the gambling floor; rather, the record indicates that they were disciplined for their discussion of tips and not on the basis of where the discussion occurred. *Ibid.*

4. The court of appeals enforced the Board's order and denied petitioner's petition for review. Pet. App. 1-

⁴ Chairman Battista's views are in accord with views that have been expressed by other former Board members. See *Saia Motor Freight Line*, 333 N.L.R.B. 784, 785-786 (2001) (Member Hurtgen, concurring); *Miller's Discount Dep't Stores*, 198 N.L.R.B. 281, 283 (1972) (Chairman Miller, dissenting), enforced on other grounds, 496 F.2d 484 (6th Cir. 1974). The Board, by contrast, permits an employer to escape liability for disciplining employees pursuant to an unlawful rule only when the employer can demonstrate interference with its business operations "and that this rather than violation of the rule was the reason for the discharge." *Id.* at 281.

21. The court agreed with the Board that the rules concerning customer service and discussion of the tips policy were invalid because they restricted employee discussion in places beyond the casino gambling floor and its adjacent aisles and corridors. *Id.* at 5-14.⁵

The court also upheld the Board's finding that petitioner had unlawfully disciplined employees for violating the invalid rule prohibiting discussions of the tips policy anywhere on company property. In so doing, the court rejected petitioner's contention that its disciplinary actions should be held lawful because it disciplined the employees for discussing tips in the casino gambling area, where petitioner could have prohibited such discussion under a valid rule. Pet. App. 15-17. Noting that it must uphold the Board's interpretation if it is "a reasonable one," the court concluded that the Board's "rule that all disciplinary actions imposed pursuant to an unlawful rule are unlawful" was a "reasonable" interpretation of the NLRA. *Id.* at 16. As the court explained, "[t]he Board has previously recognized the need to protect employees from rules that have a chilling effect on the exercise of their rights," and that the Board's rule "reduces the chilling effect that results from [the] imposition of overbroad rules." *Id.* at 16, 17 (citing *Lafayette Park Hotel*, 326 N.L.R.B. at 825; *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67 (2d Cir. 1992)). The court also noted that "[t]he situation under consideration is analogous to [] constitutional overbreadth challenge[s]," which "[c]ourts permit * * * because they facilitate the striking down of laws which have a chilling effect on per-

⁵ The court, however, modified the cease-and-desist provision of the Board's order to limit the order to the areas outside of the gambling floor and the adjacent aisles and corridors. Pet. App. 13-14.

sons whose actions may not be lawfully proscribed." *Id.* at 16.

The court of appeals upheld the Board's finding that petitioner's confidential-information rule was unlawful because it expressly prohibited employees from discussing wages and other terms and conditions of employment. Pet. App. 18-21. The court agreed with the framework set forth in *Lafayette Park Hotel*, 326 N.L.R.B. at 825, to balance the interest of employers in maintaining confidentiality rules and the rights of employees under Section 7 to discuss their terms of employment. While recognizing employers' legitimate interest in maintaining the confidentiality of private information, the court reasoned that employers could not prohibit employees from discussing their wages or working conditions. Pet. App. 19. The court concluded that "confidential information cannot be defined so broadly as to include working conditions." *Id.* at 20. The court thus held that petitioner's "definition of 'confidential information' clearly violates Section 8(a)(1) because it expressly includes 'salary information[,] . . . salary grade[, and] . . . types of pay increases.'" *Ibid.* (alterations in original).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. Petitioner challenges (Pet. 16-24) the court of appeals' conclusion that petitioner unlawfully disciplined employees for violating its invalid rule prohibiting employees from discussing the tips policy anywhere on petitioner's property. While conceding that its rule was

overbroad and invalid (Pet. 17 & n.3), petitioner argues that its disciplinary actions should be found lawful because the disciplined employees discussed the tips policy on the casino floor, a location where petitioner could by rule validly prohibit such discussions. It is by no means clear, however, that petitioner could prevail under such a theory on the facts of this case. Chairman Battista determined in his concurring opinion that, even applying a policy under which "not * * * all discipline imposed pursuant to an overbroad rule is necessarily unlawful," the disciplinary action imposed in this case nonetheless was unlawful. He reasoned that the record showed that petitioner's discipline of the employees "was based on their discussion of tips and not on the locus where the discussion occurred." Pet. App. 38.

In any event, petitioner's claim does not warrant review. Specifically, petitioner claims that the court of appeals' decision (i) was based on a constitutional overbreadth doctrine that was improperly applied to NLRA jurisprudence, and (ii) conflicts with this Court's decision in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), and with Section 10(c) of the NLRA, 29 U.S.C. 160(c). Those contentions lack merit and do not warrant review.

a. Petitioner's assertion that the court of appeals' decision was based on a "constitutional overbreadth" doctrine misapprehends the court's opinion. In upholding the Board's conclusion that petitioner's disciplinary actions violated the NLRA, the court of appeals principally relied on law developed under the NLRA rather than on constitutional overbreadth principles. Pet. App. 14-17. The court explained that, "[b]y adopting the rule that all disciplinary actions imposed pursuant to an unlawful rule are unlawful, the Board reduces the chilling

effect that results from imposition of overbroad rules.” *Id.* at 16.⁶ The court also cited Board decisions that “recognized the need to protect employees from rules that have a chilling effect on the exercise of their rights,” and the court concluded that “the Board’s interpretation is reasonable.” *Id.* at 16, 17 (citing *Lafayette Park Hotel*, 326 N.L.R.B. at 825; *Vanguard Tours*, 981 F.2d at 67). The court therefore held, in agreement with other courts of appeals, that the Board acted reasonably in concluding that “a disciplinary action for violating an unlawful rule is itself a violation of the NLRA.” *Id.* at 17; see *NLRB v. McCullough Envtl. Servs., Inc.*, 5 F.3d 923, 931 n.9 (5th Cir. 1993); *NLRB v. Lummus Indus., Inc.*, 679 F.2d 229, 232, 233 & n.6 (11th Cir. 1982).⁷ Although the court of appeals added the observation that “[t]he situation under consideration is *analogous* to a constitutional over-breadth challenge,” Pet. App. 16 (emphasis added), the court did not, as petitioner asserts (Pet. 17), base its holding “on a novel and unwarranted importing of a constitutional overbreadth doctrine as a new element of NLRA jurisprudence.”

b. Petitioner also argues that the decision of the court of appeals is inconsistent with *Transportation Management*, which upheld, as a permissible construction of the NLRA, the Board’s burden-shifting approach in cases in which the employer asserts both unlawful and

⁶ The Board cited *Opryland Hotel*, 323 N.L.R.B. at 728, and *Saia Motor Freight Line*, 333 N.L.R.B. 784 (2001). Pet. App. 23-24 n.3.

⁷ Although petitioner argues (Pet. 18) that those decisions do not present the exact situation presented here, the decisions support the general principle approved by the court of appeals in this case, and petitioner does not suggest that the decisions conflict with the court of appeals’ decision below.

lawful motives for a discharge or other adverse employment action.⁸ Petitioner argues that the court of appeals' decision conflicts with *Transportation Management* because it denied petitioner the right to assert the affirmative defense that it disciplined employees for a lawful reason. Petitioner further claims that the decision conflicts with Section 10(c) of the NLRA, 29 U.S.C. 160(c), which provides that the Board shall not require reinstatement or backpay if an individual was suspended or discharged for cause.

Because petitioner failed to raise those arguments before the Board, including in a motion for reconsideration, the NLRA prevents the Court from considering those arguments in the first instance. See 29 U.S.C. 160(e) ("No objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-666 (1982) (bar against judicial review under 29 U.S.C. 160(e) applies when party fails to preserve objection to Board's decision by filing motion for reconsideration with the Board); *International Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (same). Petitioner could have raised those issues to the Board in a motion for reconsideration of

⁸ Under that approach, the Board's General Counsel must first show that union activity was a motivating factor in an employer's decision to "discharge or [engage in] other adverse action" against a statutory employee. *Transportation Mgmt.*, 462 U.S. at 401. Once that showing is made, the employer can avoid liability by demonstrating as an affirmative defense that it would have made the same decision in the absence of any protected activity. *Id.* at 401-402.

the Board's conclusion that, "where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule." Pet. App. 24 n.3. Petitioner also failed to raise those arguments in the court of appeals. This Court typically does not consider claims that were neither raised nor decided below, see *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984), and there is no reason to depart from that customary practice here.

In any event, petitioner's claim of a conflict with *Transportation Management* is without basis. Petitioner argues that, because it could have maintained a rule barring discussion on the casino floor, it therefore could discharge employees for that activity even in the absence of a valid rule. The Board has long held, however, that where, as here, an employer disciplines employees pursuant to an overbroad rule, proof that the employer would have disciplined the employee for a lawful reason requires proof that the employee interfered with the employer's business operations "and that this rather than violation of the rule was the reason for the discharge." *Miller's Discount Dep't Stores*, 198 N.L.R.B. 281, 281 (1972), enforced on other grounds, 496 F.2d 484 (6th Cir. 1974). That rule, which preceded *Transportation Management*, is not inconsistent with that decision, and it reasonably takes account of the danger that, absent such proof, the discipline would be understood in the workplace as enforcement of the overbroad rule (which, as Chairman Battista noted, is how the discipline was understood in this case, Pet. App. 38-39).

Petitioner made no claim that the particular employee discussions leading to the discipline actually in-

terfered with its casino floor operations. Indeed, in the court of appeals, petitioner argued that the discipline was lawful because its rule prohibiting discussion of tips was limited to the casino floor. As petitioner acknowledges (Pet. 17 n.3), the court rejected that factual contention, and petitioner does not challenge that rejection. Accordingly, having failed to make a particularized showing that the employees' discussion interfered with its casino floor operations and that such interference, rather than its unlawful rule, was the actual reason for the discipline, petitioner has failed to establish that the employees were discharged for cause within the meaning of Section 10(c). In those circumstances, the analysis approved by this Court in *Transportation Management* for situations in which discipline is based on both unlawful and lawful reasons is inapplicable. See *Saia Motor Freight Line*, 333 N.L.R.B. 784 (2001) (discipline for violating unlawful, overly broad rule itself constitutes violation of Section 8(a)(3), without consideration of dual-motivation analysis under *Transportation Management*); see also *Lummas Indus.*, 679 F.2d at 232, 233 n.6 (same).

2. Contrary to petitioner's argument (Pet. 25-30), the court of appeals' holding that petitioner's maintenance of its confidential-information rule was unlawful does not conflict with the decisions of other courts of appeals. In the cases relied on by petitioner, the courts upheld differently worded confidential-information rules but did not disagree on the applicable legal standard. Because those decisions, like this one, turn on the particular facts, there is no warrant for this Court's review.

In evaluating rules proscribing discussion of information, the Board determines whether maintenance of the rule "would reasonably tend to chill employees in the

exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 N.L.R.B. at 825; accord *Brockton Hosp. v. NLRB*, 294 F.3d 100, 106-107 (D.C. Cir. 2002), cert. denied, 537 U.S. 1105 (2003). In making that determination, the Board considers whether "employees could reasonably believe that the rule prohibits discussions among employees concerning wages, benefits, and other terms and conditions of employment." *Lafayette Park Hotel*, 326 N.L.R.B. at 826; accord *Brockton Hosp.*, 294 F.3d at 106-107. As the court of appeals explained below, the Board's test recognizes both the need of employees "to discuss their terms of employment" and the "substantial and legitimate interest" of employers "in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information." Pet. App. 19.

Under that test, the Board has upheld confidentiality rules that restrict disclosure of business information and do not explicitly refer to information concerning "employees," because those rules reasonably protect the employers' interest in maintaining the confidentiality of its proprietary information and "employees * * * reasonably would understand" that such rules are "designed to protect that interest rather than to prohibit the discussion of their wages." *Lafayette Park Hotel*, 326 N.L.R.B. at 826 (rule prohibiting divulging of "Hotel-private information"); see *Super K-Mart*, 330 N.L.R.B. 263, 263 (1999) (restricting disclosure of "Company business and documents"). On the other hand, the Board has invalidated those confidentiality rules that expressly prohibit employees from revealing information about "employees" and that define information about employee wages and working conditions as confidential. *E.g.*,

Brockton Hosp., 294 F.3d at 106-107 (affirming Board's invalidation of rule that provided that information concerning "associates [*i.e.*, employees] * * * should not be discussed either inside or outside the hospital, except strictly in connection with hospital business," because employees could believe that rule restricted their right to discuss wages and working conditions); *IRIS U.S.A., Inc.*, 336 N.L.R.B. 1013 (2001) (invalidating rule stating that information about employees is strictly confidential and cannot be disclosed to anyone, including other employees).

The court of appeals correctly applied those principles in upholding the Board's finding that petitioner's confidential-information rule was unlawful. As the court stated, petitioner's policy restricted employees from communicating information considered "confidential," a term that was explicitly defined to include information concerning salary, grievances and complaints, discipline, and other terms and conditions of employment. See Pet. App. 18-21. The court observed that, in conjunction with petitioner's rule prohibiting employees from communicating "confidential information," employees could reasonably conclude that discussion of salary information was proscribed. *Id.* at 20.

In the cases relied on by petitioner (Pet. 26-28), the courts, on different facts, determined that the specific language of the confidentiality rules at issue would not reasonably tend to chill employees' exercise of their right to discuss wages and terms and conditions of employment with other employees or with union officials. In *Community Hospitals v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003), the rule at issue—which restricted the "[r]elease or disclosure of confidential information concerning patients or employees," *id.* at 1088—did not ex-

pressly define confidential information to include information about salary and working conditions. The court concluded that a reasonable employee would not believe that the rule would bar an employee from discussing his or her wages and working conditions. *Id.* at 1089. Petitioner's policy, unlike the rule at issue in *Community Hospitals*, explicitly encompassed salary information and information about grievances and discipline. In addition, because the policy in *Community Hospitals* expressly treated "confidential information concerning * * * employees" on a par with "confidential information concerning *patients*," *id.* at 1088 (emphasis added), the court concluded that a reasonable employee would not interpret the rule to prohibit discussion of his or her *own* wages or employment conditions, *id.* at 1089.

In *NLRB v. Certified Grocers of Illinois, Inc.*, 806 F.2d 744 (7th Cir. 1986), a company official, replying to an employee's question about how the union had obtained her address, stated that an employee's name and address were confidential and that the leak could only have come from petitioner's payroll, personnel, or data-processing departments. The court found that the official's statement "could only have been understood to mean * * * that it was against company policy for workers to disclose information to which they had access by virtue of their employment in the payroll, personnel, or data-processing departments," and not to implicate employees' rights under Section 7 to discuss their wages and other terms and conditions of employment. *Id.* at 747.⁹

⁹ *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990), on which petitioner relies (Pet. 28), is wholly inapposite. There, the Fifth Circuit summarily affirmed the Board's uncontested finding that the employer had unlawfully "promulgated a workplace rule that forbade

Petitioner contends (Pet. 29 & n.6) that its rule applied only to "information obtained through the course of employment," and that no employee would read the rule to limit discussion of his or her own working conditions. Petitioner made the same argument below in challenging the Board's fact-finding in this case. That challenge was correctly rejected by the court of appeals, and it does not warrant further consideration by this Court. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951) ("Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals."). In any event, petitioner's rule expressly defined confidential information in terms of working conditions, and the rule stated that its examples of confidential information were "not all-inclusive." Pet. App. 18. In addition, petitioner distributed the rule to all employees by placing it in the employee handbook under the general information section, along with other rules that unlawfully restricted employee communication and discussion at the workplace. See pp. 4-5 and note 3, *supra*. In those circumstances, the rule was susceptible to a broad reading that "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 N.L.R.B. at 825.

the discussion of confidential wage information between employees." 919 F.2d at 363. The quotation relied upon by petitioner—that Section 7 "does not extend to the unauthorized dissemination of information obtained from an employer's confidential files or records," *ibid.*—referred not to construing the employer's confidentiality rule, but instead to the legality of the employer's discharge of an employee who had stolen evaluations of co-workers and a list of wage increases from his supervisor's desk and had shared that information with others.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005

**In The
Supreme Court of the United States**

DOUBLE EAGLE HOTEL & CASINO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

**REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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INTRODUCTION

The present case allows this Court to address two important issues: 1) whether *all* discipline imposed pursuant to an overbroad rule is necessarily and conclusively unlawful; and 2) whether an employer is precluded from requiring those employees who have access to the salary and pay information of other employees to keep that information confidential.

In its Opposition Brief ("Opp. Brief"), the National Labor Relations Board ("NLRB" or "Board") asserts that certain arguments raised in Double Eagle's Petition were not argued before the Board and that Section 10(e) of the National Labor Relations Act ("NLRA" or "the Act") precludes this Court's full consideration of certain aspects of the first issue. It is understandable that the Board would seek to divert this Court from a full review of the Tenth Circuit opinion – particularly its conflict with Section 10(c) of the Act. The issue which the Board seeks to keep from this Court's review, however, was at the heart of the arguments and analysis both at the Board and the Tenth Circuit as explained in Section I.C. of this Reply. For the reasons set forth in Double Eagle's Petition and herein, the Court should review the opinion of the Tenth Circuit to resolve a long-standing conflict and to provide clear guidance to employers and to the NLRB on these important issues.

I. This Case Presents An Important Issue That Needs To Be Resolved By This Court.

A. The NLRB has for many years been divided on the issue of whether *all* discipline imposed pursuant to an overbroad rule is necessarily and conclusively unlawful.

A review of the cases cited at page 7 of the NLRB's Opposition Brief, in footnote 4, confirms that, for nearly thirty-five years, the members of the NLRB have been divided on the issue of whether all discipline imposed pursuant to an unlawful rule is conclusively unlawful. In *Daylin, Inc., Discount Division d/b/a Miller's Discount Department Stores* ("Miller's Discount"), 198 N.L.R.B. 281 (1972), the employer had adopted an

overbroad rule that it applied in a discriminatory manner to prohibit union solicitation. Two employees were discharged for union solicitation during work time. The majority of the Board found the discharge to be unlawful and held that an overbroad rule can provide no justification for the discharge of an employee who violated it. Chairman Miller filed a dissenting opinion in which he compellingly explained his opposition to the majority's action:

I have concluded that in assessing the lawfulness or unlawfulness of employer imposed discipline in any case, we must focus upon: (1) whether, on the facts of the case, the discipline interfered with the legitimate exercise of Section 7 rights and therefore violated Section 8(a)(1); (2) whether the discipline discriminated against an employee so as "to encourage or discourage membership in any labor organization"; and (3) whether, under Section 10(c) of the Act, we are forbidden to order reinstatement because the individual was "suspended or discharged for cause."

Thus, if an employee is disciplined for engaging in conduct which an employer may lawfully prohibit – i.e., utilizing work time for engaging in nonproductive activity, whatever its nature, including the use of such working time for union activity – it would seem that there is no per se interference with employee rights under Section 8(a)(1). Nor would such discipline constitute 8(a)(3) discrimination unless it were shown that the employee who utilized such working time for union activity was treated more harshly than other employees apprehended while engaging in a like, but not union-connected, prohibited use of working time. Further, if there is no such interference or discrimination shown and we order an employee reinstated, I fear we have run afoul of Section 10(c) in that we have ordered reinstated an employee who was discharged for conduct which an employer may lawfully, and did, prohibit.

Id. at 283.

Twenty-nine years later, in *Saia Motor Freight Line, Inc.* ("Saia"), 333 N.L.R.B. 784 (2001), the Board again addressed a

case in which an employer had established an overly broad no-solicitation/no-distribution rule. The panel's majority expressly found that it was unnecessary to engage in a *Wright Line* analysis in finding that a disciplinary warning for violation of the overbroad rule violates the Act. It specifically held that "any disciplinary action taken pursuant to an unlawful no-solicitation rule is likewise unlawful. . . ." *Id.* at 784-785. Member Hurtgen filed a concurring opinion in which he adopted the dissenting opinion of Chairman Miller in the *Miller's Discount* case:

I do not agree that disciplinary action which is imposed pursuant to an unlawful rule is necessarily unlawful.[FN 1] For example, if an employer has a rule that is unlawfully broad (e.g., solicitation is banned at all times), that rule would not necessarily render unlawful the application of the rule to warn an employee to stop soliciting during work time.

FN 1. See the dissenting opinion in *Miller's Discount Department Stores*, 198 N.L.R.B. 281, 283 (1972).

Id. at 785-786.

That ongoing division among NLRB members is again apparent in this case. In response to the majority decision of the three-member panel, Chairman Battista filed an opinion concurring in part and dissenting in part, in which he reiterated and continued the long-standing division among NLRB members on this issue:

[C]onsistent with former member Hurtgen's concurring position in *Saia Motor Freight Line*, 333 N.L.R.B. 784, 785-786 (2001), I would not find that *all* discipline imposed pursuant to an overbroad rule is necessarily unlawful.

(Appendix, page 38). Thus, the issue that has been percolating for nearly thirty-five years, dividing the members of the NLRB, has once again emerged in this case.

B. This case has broad implications in the field of labor/employment relations.

If the holding of the Tenth Circuit in this case is not reversed, it will stand for the proposition that, where an employer has adopted an overbroad rule, any discipline

that may fall within the scope of that overbroad rule, whether it would otherwise have been lawful or not, is deemed conclusively unlawful, without even considering whether the discipline was for cause.

An employer's right to discipline or discharge employees for misconduct is an established and important prerogative that is fundamental to an employer's ability to establish an orderly workplace and run a business effectively. This Court has repeatedly recognized an employer's right to discipline employees for legitimate reasons and has held that this right remains intact even if the employer was motivated in part by illegal reasons. *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393, 394-395, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983) ("employers retain the right to discharge workers for any number of other reasons" and "the employer may assert legitimate motives for his decision"); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 284-287, 97 S.Ct. 568, 574-576, 50 L.Ed.2d 471 (1977) (if a lawful reason alone would have sufficed to justify the discipline, the employee cannot prevail in a claim against the employer). The employer's right to discipline employees for legitimate reasons impacts the availability of remedies to an employee for unlawful discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249-250, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (citing 29 U.S.C. § 160(c) as an example of the general principle that a court cannot order affirmative relief for an employee if the employer would have made the same decision for legitimate reasons); *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995) (remedies available to employees are limited by the employer's prerogative to discipline employees for lawful reasons); see, also, 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (1991) (even where action by an employer is found to be unlawful and an injunction warranted, if the employer would have taken the same action in the absence of the impermissible motivating factor, remedies of backpay and reinstatement are precluded).

The fundamental employer rights referenced above were incorporated by Congress into the NLRA. Section 10(c) expressly limits the Board's authority to impose a remedy of

reinstatement or backpay for any individual who was suspended or discharged for cause. Under the Tenth Circuit's ruling in this case, that clear Congressional mandate and limitation on Board authority is simply ignored, as is any *Wright Line* analysis, in cases in which an employer's rule has been found to be overbroad.

Finally, the opinion rendered by the Sixth Circuit Court of Appeals in *Miller's Discount* identifies another important implication of the Tenth Circuit's holding in this case. The Sixth Circuit noted that the Board's majority opinion in *Miller's Discount* takes the point of view that where a no-solicitation rule goes beyond permissible limits, that rule can provide no justification for the discharge of an employee who violated it, unless the employer can establish that the solicitation interfered with the employee's own work or that of other employees and that the interference, rather than violation of the rule, was the reason for the discharge. The Court then noted:

This, of course, would have the effect of shifting the burden of proof as to the challenged discharges from the general counsel to the respondent. To assess the validity of the Board's theory it would be necessary to decide the question whether a no-solicitation rule that is overbroad on its face may, nevertheless be validly enforced against persons engaging in unprotected activity. Because we hold that the no-solicitation rule here was enforced in a discriminatory fashion, and that decision suffices to sustain the Board's remedial order, we need not decide, and we expressly reserve judgment on, this question.

N.L.R.B. v. Daylin, Inc., Discount Division, 496 F.2d 484, 489, n. 3 (6th Cir. 1974). The issue not decided by the Sixth Circuit was presented squarely to and was decided by the Tenth Circuit in this case. Its decision has far reaching implications in the entire field of labor/employment relations.

C. This issue has been at the heart of this case from the start and Rule 10(e) does not preclude this Court's consideration of the issue.

In an effort to avoid review by this Court of the serious implications of the Tenth Circuit's holding, the NLRB asserts at page 12 of its Opposition Brief that this Court is prevented from considering certain arguments because they were not raised before the Board. Double Eagle has consistently asserted before the Board and the Tenth Circuit its right to discipline employees for conduct which it could lawfully proscribe. That the issue was adequately raised at the Board level is apparent from the fact that Chairman Battista, concurring in part and dissenting in part, stated: "I would not find that *all* discipline imposed pursuant to an overbroad rule is necessarily unlawful," citing Member Hurtgen's concurring position in *Saia*. (Appendix, p. 38). Member Hurtgen's concurring position in *Saia*, as discussed in Section I.A. above, relied on and incorporated the dissenting opinion in *Miller's Discount*. That opinion, which is cited at some length in Section I.A. above, fully sets forth the fundamental dispute on this issue. To suggest that this dispute, which has been percolating among Board members for over three decades, had somehow escaped the attention of the Board in this case is simply wrong. The Board majority, in footnote 3 of its decision, expressly acknowledged the contrary view, rejected the principles that have been asserted by the dissenting Board members over the years, and affirmed the rule that, "where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule." (Appendix, pp. 23-24). Double Eagle has consistently asserted at every level of these proceedings that its tips discussion policy, as applied to the conduct of the three employees, was a lawful rule and that their discipline was lawful. Double Eagle obviously raised the issue sufficiently to have it expressly addressed by both the Board's majority and dissenting members.

Even if Section 10(e) could otherwise have had any application in this case, it is inapplicable to the Section

10(c) issue because the Board has, in ignoring the limitation of Section 10(c), "patently traveled outside the orbit of its authority." See, e.g., *N.L.R.B. v. Annapolis Emergency Hospital*, 561 F.2d 524, 528 (4th Cir. 1977).

II. The Tenth Circuit Opinion In This Case Affirms NLRB Action Which Violates Section 10(c), Is Beyond Its Authority And Eviscerates Long-standing Employer Rights.

A. In ignoring the express prohibition of Section 10(c), the Board acted outside of the scope of its authority in this case.

The clear, direct and mandatory language of Section 10(c) of the NLRA imposes a limitation on the authority of the Board:

No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

The opinion of the Tenth Circuit makes two points perfectly clear: 1) "The disciplinary actions were taken based on discussion of the tip-splitting policy on the casino floor" (Appendix, page 15); and 2) "The Respondent lawfully [can] prohibit employees from . . . discussing their working conditions in the casino's gambling area, and adjacent aisles and corridors frequented by customers. . . ." (Appendix, pp. 13-14). The Tenth Circuit reaches the obvious conclusion from these two points: "Therefore, all three employees were disciplined for actions that they could have been disciplined for under a lawful tips rule." (Appendix, page 16). Those two points and that conclusion perfectly frame the Section 10(c) issue that has divided the Board in *Miller's Discount, Saia* and this case. The Tenth Circuit's opinion confirms that the three employees were suspended or discharged for cause.¹ Under those circumstances, the Board is simply

¹ The Board's statement in its Opposition Brief (p. 5) that these employees were disciplined "shortly after a union organizing campaign
(Continued on following page)

acting outside of its authority when it orders reinstatement and back pay for those individuals.²

B. The facts of this case not only clearly frame this issue, but also clearly demonstrate the danger of the Tenth Circuit's holding.

The Opposition Brief overstates the evidence when it repeatedly implies that there was a clear policy that tips could not be discussed anywhere on the premises. While it is true that the Tenth Circuit deferred to the Board's factual conclusion that the tips policy applied beyond the gaming floor, that conclusion was based on the thinnest of evidence. The record below demonstrates that all of the management witnesses who testified about the tips discussion policy testified that it only applied to the gaming

began" is simply inaccurate. It is also entirely irrelevant because this is neither a retaliation case nor a discriminatory application case.

² At page 13 of its Opposition Brief, the NLRB asserts that Double Eagle failed to demonstrate that the "particular employee discussions leading to the discipline actually interfered with its casino floor operations." The NLRB cites only one case - *Miller's Discount* - to support the proposition that such evidence is required. The Board acknowledges that "[f]or casinos, the Board applies the same standards it has developed for retail stores," and that under those standards, there is business justification for enforcing rules against solicitation in selling areas and gaming floors. Opp. Brief, p. 2. There is no requirement to show actual disruption to support such rules or to support specific disciplinary actions against employees who violate such rules. *Bankers Club, Inc.*, 218 N.L.R.B. 22, 27 n. 11 (1975) ("The Board has long approved employer rules prohibiting all solicitation [in the selling areas of retail establishments] on the theory that such activity might tend to drive away customers."); *McDonald's of Palolo*, 205 N.L.R.B. 404, 408 (1973) (non-solicitation rule was valid because "... the Employer could reasonably anticipate that the exercise of their Section 7 rights by the employees would disrupt its business."). On appellate review of *Miller's Discount*, the Sixth Circuit explicitly refused to affirm the reasoning of the Board, which reasoning remains contrary to the great weight of authority. Even if proof of actual disruption were required, the record below demonstrates that Double Eagle's rule prohibiting discussions about tips on the gaming floor was based on experience with disruptions and customer complaints resulting from actual employee disputes over tips in front of customers on the gaming floor. Discussion of tips had already had a disruptive impact on customers and business at Double Eagle.

floor and denied that they had ever stated that it applied more broadly than that. There was no credible testimony to the contrary. Employees who testified that the tips policy applied more broadly referenced statements of other "employees on the floor," "rumor," "word of mouth," "scuttlebutt," and "grapevine" as the source of their information that employees could not talk about tips anywhere on the premises. Based on extremely weak evidence, the Board concluded that the tips policy was overbroad. The record is clear, however, that management never enforced the tips policy beyond the gaming floor and never disciplined employees for discussing tips in any other areas.³

This case illustrates the danger of the Tenth Circuit's holding. If a policy intended by management to apply only within a proper scope or area can be expanded by employee discussion to the point of overbreadth, employees who are disciplined for violation of the policy, even within its valid scope of application, will be imbued with immunity for their misconduct. The Tenth Circuit's holding gives employees an inordinate motivation to make every effort, both in the work place and in their testimony, to expand the scope of policies in order to claim entitlement to the "overbreadth" trump card. Moreover, absolute perfection in drafting and communicating employment policies is difficult to achieve. While employers should certainly be required to revise or clarify imperfect or overbroad policies, disciplinary actions should not be overturned unless they were based upon enforcement of a policy in an unlawful manner. In this case, Double Eagle only enforced its policy within a lawful and proper scope.

C. The Tenth Circuit's opinion eviscerates an employer's right to discipline for cause.

Section I.B. above addresses the widely recognized prerogative an employer to discipline employees for cause.

³ The scope of the tips policy is not a matter of dispute at this stage of the proceedings because Double Eagle is, and has always been, willing to limit its tips policy to the gaming floor and adjacent areas. That was always intended to be the scope of the policy.

That prerogative has been recognized repeatedly by this Court and has been incorporated by Congress in the statutory enactments referenced above. The Tenth Circuit's opinion in this case conflicts with the principles announced by this Court's prior rulings and incorporated into those statutes. Granting Double Eagle's Petition will allow this Court to correct those conflicts and preserve a carefully drawn balance between employer and employee rights and remedies.

III. The Tenth Circuit's Opinion In This Case Has Disrupted The Balance Struck By Other Circuit Courts Between Employees' Rights To Communicate And An Employer's Right To Maintain Confidential Employee Information.

In a time in which the handling of private information has become a matter of significant concern, legislation and regulation (*see, e.g.*, HIPAA Privacy Rules, 45 CFR, Parts 160-164), the Tenth Circuit has adopted what is essentially a bright line rule that a confidential information policy is unlawful under the NLRA if it forbids disclosure of anything that could fit into the category of working conditions. The Tenth Circuit found that Double Eagle's definition of "confidential information" clearly violates Section 8(a)(1) because it expressly includes salary information and information regarding pay increases. Thus, an employee in Double Eagle's payroll office is free to disclose information about other employees' salaries or pay increases with impunity under the Tenth Circuit's holding in this case. That balance is significantly at odds with the balance struck by other circuits in cases referenced at pages 26 through 28 of Double Eagle's Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth herein and in its Petition for Writ of Certiorari, Double Eagle respectfully prays this Court to grant its Writ of Certiorari to review the important questions raised in this case.

Respectfully submitted,

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